TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 57

EASTERN TRANSPORTATION COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

FILED APRIL 11, 1925

(31,018)

(31,018)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 351

EASTERN TRANSPORTATION COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 24, 1925

[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF VIRGINIA

In Admiralty. No. 3203

EASTERN TRANSPORTATION COMPANY, a Corporation, Libellant,

versus

UNITED STATES OF AMERICA and SEABOARD TRANSPORTATION COMPANY, a Corporation, Respondents

LIBEL—Filed July 26, 1921

[fol. 2] To Hon. D. Lawrence Groner, judge of the court aforesaid:

The libel and complaint of the Eastern Transportation Company against the United States of America as owner of the Steamship Snug Harbor proceeded against in pursuance of an Act of Congress approved March 9, 1920, and against the Seaboard Transportation Company, a corporation, in a cause of collision, civil and maritime, alleges and propounds as follows:

First. The libellant is now, and was at all the times hereinafter set forth, a corporation chartered and existing under the laws of the State of Maryland, and the owner of the barge J. H. Winstead, a wooden vessel of 811 gross tons burden, and the bailee of the cargo on said barge.

Second. At all the times hereinafter set forth the United States of America was, and is, a corporation Sovereign, and the owner of the steamship Snug Harbor, a steel vessel of 2588 tons burden, 264 feet in length, 42 feet in beam, and 24 feet in depth.

Third. At all the times hereinafter set forth the Seaboard Transportation Company was, and it still is, a corporation chartered and [fol 3] existing under the laws of the State of Massachusetts, and the owner of the tug Covington and the barge Pottsville.

Fourth. On August 15, 1920, about 9:30 p. m., while the steamship Snug Harbor was employed solely as a merchant vessel and was on a voyage from Baltimore, Md. to Portland, Me., she came into collision with the barge Pottsville in tow of the tug Covington, and as result, was sunk, and then and there became a total loss.

Fifth. The position of the wreck of the Snug Harbor is, and was, about four and one-quarter miles East by North of Montauk Point Light, in a frequented channel way, within the harbor and inland waters.

Sixth. The wreck of the Snug Harbor was not marked with a buoy or beacon by day or a lighted lantern by night, and was not removed, by the United States of America or the Seaboard Transportation Company. Up to the time hereinafter mentioned notice had not been given or published advising mariners navigating the waters in which the Snug Harbor had sunk of the presence of the wreck.

Seventh. On the 14th of September, 1920, about 5:00 p. m., the barge J. H. Winstead then loaded with a full cargo of coal, in tow of the tug Barrallton, on a voyage from Norfolk, Va. to Fall River, Mass., came into contact with the wreck of the Snug Harbor, and as [fol. 4] a result, was sunk, and then and there, with the cargo thereon, became a total loss.

Eighth. The collision between the Snug Harbor and the Pottsville was due to negligence and carelessness upon the part of those in charge of the steamship, the tug and the barge in the following particulars:

As to the Snug Harbor

(1) She was improperly manned and equipped.
(2) Her navigation was in the hands of careless and incompetent persons.
(3) No proper lookout was maintained.
(4) She was proceeding at an excessive rate of speed.
(5) She was not giving proper signals.
(6) She failed to keep out of the way of the Covington.
(7) She failed to heed the signals of the Covington.
(8) She failed to avoid collision with the Pottsville.
(9) She failed to take seasonable measures to prevent the collision or diminish the damages resulting therefrom.

As to the Covington

(1) She was proceeding at an immoderate and excessive rate of speed in a fog.
(2) She failed to stop her engines and navigate with caution until danger of collision was over.
(3) She did not alter her course to avoid collision.
[fol. 5] (4) She failed to maintain a competent lookout, properly stationed, who was attentive to his duties.
(5) She failed to blow fog signals, as required by statute in such case made and provided.
(6) She, the burdened vessel, failed to keep clear of the steamship Snug Harbor, the privileged vessel.
(7) She failed to listen for and hear fog signals blown by the steamship Snug Harbor.
(8) She did not heed the fog signals blown by the steamship Snug Harbor.

(9) She continued upon her course across the bow of the steamship Snug Harbor from port to starboard.

(10) She failed to cast off her tow, or take any other steps, when a collision was imminent, to avoid the same.

(11) After the collision she abandoned the steamship Snug Harbor, and her crew, although repeatedly requested to stand by and render assistance, contrary to the statute in such case made and provided.

(12) She failed to stand by the barge Pottsville, with the crew of the steamship Snug Harbor on board, although repeatedly requested, and though the barge Pottsville was in a damaged condition, contrary to the statute in such case made and provided.

(13) She was in charge of an incompetent master, who was inattentive to his duties, and as to other faults which will be pointed out at the trial.

As to the Pottsville

(1) She was proceeding at an immoderate and excessive rate of speed in a fog.

(2) She failed to maintain on board a competent lookout, who was attentive to his duties.

[fol. 6] (3) She failed to blow fog signals as required by regulation in such case made and provided.

(4) She failed to change her course to avoid collision, when a collision was imminent.

(5) She failed to cast off her hawser, or take any other steps to avoid collision.

(6) She was in charge of an incompetent master, who was inattentive to his duties, and as to other faults which will be pointed out at the trial.

Ninth. When the barge Winstead collided with the wreck of the Snug Harbor and as a result became, with her cargo, a total loss as aforesaid, she was being navigated in a proper and skillful manner, and the presence of the wreck of the Snug Harbor was not apparent to those in charge of the barge, and the coming of said barge into contact with said wreck, and the consequent sinking and loss of said barge, were due to the unlawful presence of said wreck at the point aforesaid.

Tenth. By reason of the premises the respondents are jointly and severally responsible for the presence of the wreck of the steamship Snug Harbor, and because of their failure to mark, buoy or remove the same, for the damages resulting from the loss of the barge J. H. Winstead and her cargo.

Eleventh. When the barge and her cargo were lost as aforesaid the barge was of the value of $90,000, and her cargo of the value of $15,000.

[fol. 7] Twelfth. The Seaboard Transportation Company is a foreign corporation, but has or will have during the pendency of process

herein estate, to-wit Barges Ohio, Kentucky, Kennebec, Idaho, Occidental, Iowa, Indiana, Pottsville, George R. Schofield, and Lancaster, and tugs Richmond and Covington, or some of them, in the Eastern District of Virginia within the jurisdiction of the United States and of this Honorable Court.

Thirteenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and maritime jurisdiction, may issue against the Seaboard Transportation Company, and that if it be not found, its property to-wit, the barges Ohio, Kentucky, Kennebec, Idaho, Occidental, Iowa, Indiana, Pottsville, George R. Schofield, and Lancaster, and tugs Richmond and Covington, or some of them, may be attached, and the said Seaboard Transportation Company, and all persons having or pretending to have any right, title or interest in the property attached as aforesaid, may be cited to appear and answer under oath all and singular the matters aforesaid, and that a decree may be entered against the said Seaboard Transportation Company for the damages aforesaid, with interest and costs, and that its prop-
[fol. 8] erty, to-wit the barges Ohio, Kentucky, Kennebec, Idaho, Occidental, Iowa, Indiana, Pottsville, George R. Schofield, and Lancaster, and tugs Richmond and Covington, or some of them, may be condemned and sold to pay the same, and that process in due form of law, according to the course and practice of this Honorable Court in causes of Admiralty and maritime jurisdiction, and in accordance with the Rules and Requirements of the Act of Congress, may issue against the United States of America citing them to appear and answer under oath all and singular the matters aforesaid, and that a judgment and decree may be entered against them for the damages aforesaid, with interest and costs, and that the libelant may have such other, further and general relief as it is entitled to receive.

Eastern Transportation Co., by Baird, White & Lanning, Proctors. Baird, White & Lanning, Kirlin, Woolsey, Campbell, Hickox & Keating, Proctors for the Libelant.

[fol. 9] Sworn to by T. J. Hooper. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

SUGGESTION OF WANT OF JURISDICTION OF UNITED STATES—Filed May 3, 1922

To the Honorable D. Lawrence Groner, Judge of the Court aforesaid:

And now come the United States of America by Paul W. Kear, United States Attorney for the Eastern District of Virginia, appearing herein specially and not otherwise, for that purpose and very

respectfully suggest that this Honorable Court is without jurisdiction of the said proceeding insofar as it involves the United States of America and without jurisdiction of the United States of America herein for the following reasons:

(1) The said alleged cause of action set out in the said libel relates to an alleged failure on the part of the officers and/or agents of the United States to perform a purely governmental function or to alleged negligence of such officers and/or agents in the performance of a purely governmental function; and gives rise to no liability on the part of the United States of America for which they are suable in the United States Court or elsewhere.

(2) The said alleged cause of action relates to an alleged failure to mark the position of a wreck and in nowise concerns a vessel employed as a merchant vessel.

(3) The purpose of the Act of Congress approved March 9th, [fol. 11] 1920, known as the "Suits in Admiralty Act," was to prevent the arrest and detention of vessels owned and or possessed by the United States and then employed as merchant vessels and it was only to prevent such arrest and detention and the consequent interference with the operation of such vessels that the United States consented by the said Act to be sued in respect to such vessels. They have never consented by said act, or otherwise, to be sued in respect to a wreck or any object incapable of being employed as a merchant vessel.

(4) The suit in personam provided for and permitted by the above mentioned "Suits in Admiralty Act" was intended by Congress to be and is only a substitute for a suit in rem against the vessel itself and by the terms of said Act can be brought and maintained only in cases where if such vessel were privately owned a suit in rem could be maintained against her at the time of the commencement of such action and not then unless such vessel " is employed as a merchant vessel" at that time.

(5) Section 15 of the Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked and sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night, has no application to the United States of America, imposes no duty upon them and creates no liability for which they are suable in this Court or elsewhere.

[fol. 12] Wherefore, they deny the jurisdiction of this Honorable Court and pray that the said libel insofar as it is a libel against the United States of America may be forthwith dismissed.

And they will ever pray.

United States of America, by H. H. Rumble, Special Assistant in Admiralty to the United States Attorney.

[fol. 13] IN UNITED STATES DISTRICT COURT

OPINION—Filed Sept. 30, 1922

Kirlin, Woolsey, Campbell, Hickox & Keating, and Baird, White & Lanning, for libelant, Eastern Transportation Co.

H. H. Rumble, Special Assistant in Admiralty to the United States Attorney, for respondent The United States of America.

Blodgett, Jones, Burnham & Bingham, and Hughes, Vandeventer & Eggleston, for respondent Seaboard Transportation Co.

GROSER, District Judge:

This is a motion to dismiss for lack of jurisdiction.

Libelants claim against The United States as owners of the Steamship "Snug Harbor," and the Seaboard Transportation Company as owner of the Barge "Pottsville" and the Tug "Covington." The "Snug Harbor," a Shipping Board vessel, was sunk about 9:30 P. M. August 15th, 1920, about 4¼ miles east by north from Montauk Point, as the result of a collision with the "Pottsville," in tow of the "Covington." The place of the sinking is alleged to be a frequented channelway within the inland waters of The United States, and the basis of liability is the alleged failure to mark the position of the wreck, or to remove the same, as a result of which two barges belonging to libelant came into contact with the wreck and were sunk, 29 [fol. 14] days after the first collision and sinking.

It will thus be seen that the suit is brought upon the theory that The United States, by virtue of the Suits in Admiralty Act, is brought within the provisions of the Act of March 3rd, 1899, making it the duty of the owner of a vessel sunk in a navigable channel to immediately mark it with a buoy by day and a lighted lantern by night. The applicable parts of the act in question provide as follows:

"That no vessel owned by The United States, * * * shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process," etc., etc.

"That in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against The United States * * * provided that such vessel is employed as a merchant vessel" * * *

The United States deny that the Suits in Admiralty Act may be so construed as to impose on them the same duty as is imposed by a regulatory statute (Act of March 3rd, 1899) on private owners to mark wrecks, or the same liability for failure to do so. That the liability here asserted is not a liability of the vessel, but a personal liability of The United States to perform a duty imposed by statute, and that in the very nature of things the sovereign cannot be guilty of a violation of its own statute,—certainly not without its consent, and that the provisions of the Suits in Admiralty Act give no consent.

[fol. 15] In England, the law seems to be that the owner of a vessel sunk in a channelway, who has not abandoned the vessel, is liable for failure to mark the wreck if other shipping is thereby damaged. (The Snark, Prob. D. 105, C. A.; The Utopia, A. C., 492 P. C.; The Douglas, 7 Prob. D. 151, C. A.). The question of abandonment would, under such circumstances, seem clearly to be a question of fact.

The doctrine stated above as applicable under the English law, was, perhaps, less well recognized in the American courts, although in a number of cases decided prior to the Act of 1899 the same general principle is announced. (The Plymouth, 225 Fed. 483; People's Coal Company, 181, Fed. 609-188 Fed. 893). There is, however, now no contention between the parties, nor indeed is there ground for any, but that under the provisions of the Act of March 3rd, 1899 (Sec. 9920 U. S. Comp. Stats. 1916) the owner of a vessel sunk in a navigable channel is required, immediately, to mark the wreck with a buoy during the day and a light at night, and to maintain such marks until the sunken craft is removed or abandoned, and to account for any damages sustained by other vessels by reason of his failure so to do. (The Fahy, 153 Fed. 866; The Macey, 170 Fed. 930; People's Coal Co., 181 Fed. 609-188 Fed. 893). Since, therefore, admittedly, this duty is imposed upon the owners of vessels privately owned or operated, it would logically seem to follow, in the absence of anything to the contrary, that in Section 2 of the [fol. 16] Act of March 9th, 1920, The United States had consented to be held to accountability equally and to the same extent. The ordinary and usual interpretation of the language of the section would so imply, for it is neither more nor less than the plain statement that in all cases in which suit in admiralty may be brought against the vessel privately owned, a libel in personam may be brought against The United States where The United States are employing such vessel in the merchant service. But counsel for The United States insist that this is not the case, and say that the Act of March 3rd, 1899, is a penal statute, and was never intended to apply to the government itself; that The United States cannot commit a legal wrong, nor be answerable in one of their courts for a violation of a regulatory statute. Undoubtedly this is true, but it does not, it seems to me, necessarily follow that because The United States can do no legal wrong, they may not consent to be answerable for a tort committed in their behalf where such tortuous act results in injury to others. On the contrary, Congress has a number of times recognized such obligation by the passage of special acts permitting suits against it for injuries occurring as a result of negligence on the part of naval vessels. And if this be true; then the only question in the case at bar is: Has such consent been given? Undoubtedly, the provisions of the Suits in Admiralty Act permit suits against the government for tort as well as for breach of contract.

[fol. 17] The negligence of the master or crew of a vessel, in any one of a dozen ways, might create liability for which no immunity could be claimed; and the same is true for the negligent violation of Federal statutes. It would not now be contended for a moment

that a Shipping Board vessel, causing injury to another through failure to have, as required by law, a licensed pilot aboard, would be entitled to immunity because of government ownership. Again, by way of illustration, all vessels are required, by statute, to be equipped with, and have burning at night, certain kinds of lights, located at certain parts of the vessel. It would not seem to be a reasonable proposition for a Shipping Board vessel not thus equipped, and thereby causing damage to another, to escape liability because of government ownership. And if this be true, it would be difficult to distinguish in principle between such a case and that at bar. So it would seem that Congress, in the passage of the Act of March 9th, 1920, intended to waive its claim of immunity, and place itself upon a parity with other ship owners engaged in similar trade and traffic; to take upon itself the same obligation that by law it imposes upon others in like business. If it had not so intended, the addition of a few words to paragraph 2 of the quoted section would have made that determination manifest and beyond question. A reservation of immunity in suits sounding in tort is contained in the Tucker Act, and in the Court of Claims Act. It is absent in the Suits in Admiralty Act; and it would, it seems to me, be to assume the un-[fol. 18] thinkable to say that the draftman of the latter act did not have in mind the different regulatory statutes then in effect, or that Congress did not intend to make the obligation to observe these statutes as much the duty of a government owned vessel, engaged in private enterprise, as of a privately owned vessel, likewise so engaged. Not only, therefore, does the express language of the act, but equally, the failure to limit its terms, lead to the conclusion of an abandonment of immunity, under the circumstances obtaining in the instant case.

The further ground of the motion to dismiss is, that since the libel alleges that the "Snug Harbor" was a total loss, and since, therefore, no suit in rem could have been maintained against the vessel, a suit in personam will not lie against The United States, under the Act of March 9th, 1920. Without now passing upon the question of whether the act in question merely substitutes an action in personam for an action in rem, I am of opinion that the motion to dismiss on this ground should be denied, and that this question should be determined after the facts are elicited in the trial of the case.

And since there is no presumption of abandonment, and as that question may be determined only upon a hearing and trial, the motion to dismiss on behalf of The United States ought to be, and is, [fol. 19] denied. The motion made on behalf of the Seaboard Transportation Company is, likewise, denied. The defenses applicable to that respondent can be better determined after a full hearing.

Motion to dismiss denied.

[fol. 20] IN UNITED STATES DISTRICT COURT

JUDGMENT AND ORDER DISMISSING LIBEL AS TO UNITED STATES OF AMERICA—Filed Jan. 30, 1925

This cause having been re-heard and re-considered on the suggestion of want of jurisdiction heretofore filed herein by the United States of America; and it appearing from the libel filed herein that prior to the time of the injury complained of in said libel the steamship Snug Harbor had been sunk and at the time of such sinking became and was a total loss; and the Court being of the opinion that on the facts alleged in the libel it is without jurisdiction of this case, doth sustain the suggestion of want of jurisdiction filed by the United States and accordingly doth—

Adjudge, order and decree that the said libel be, and it is hereby, dismissed as to the United States of America, with costs.

D. Lawrence Groner, United States District Judge.

Norfolk, Virginia.

[fol. 21] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF THE DISTRICT JUDGE THAT THE DECISION REACHED BY HIM IN THIS CAUSE WAS BASED SOLELY UPON THE QUESTION OF JURISDICTION—Filed March 20, 1925

I, D. Lawrence Groner, Judge of the District Court of the United States for the Eastern District of Virginia at Norfolk, do certify that:

(1) The libel herein was duly filed and service duly had upon the United States of America in pursuance of the Act of Congress approved March 9, 1920, known as the "Suits in Admiralty Act."

(2) The United States appeared specially and filed a suggestion of want of jurisdiction. It raised no question as to venue in this cause, but waived the same, its contention being that it was not suable in any court on the cause of action set up in the libel, and that this Court had not jurisdiction regardless of the question of venue.

(3) This cause came on to be heard upon the suggestion of the United States of America that this Court was without jurisdiction to hear and determine the controversy for the reasons in said suggestion set forth.

(4) The sole issue before the Court was as to its jurisdiction as a United States District Court sitting in admiralty, and whether it had jurisdiction over the United States in said cause, and it being [fol. 22] of opinion that it was without jurisdiction because it was alleged in the libel that before the time of the injury complained of in the said libel the S. S. Snug Harbor had been sunk and had

then and there become and was a total loss, the suggestion of the United States was sustained and the proceedings dismissed as to the United States. The sole question decided by the court was as to its jurisdiction.

(5) The documents mentioned in the stipulation of counsel filed herein are copies of those upon which the undersigned based his aforesaid opinion and decision in this cause. This certificate is made and signed in conformity with Section 238 of the act entitled "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911. Section 238 as amended.

D. Lawrence Groner, U. S. District Judge.

Norfolk, Virginia.

[fol. 23] IN UNITED STATES DISTRICT COURT

PETITION FOR AND ORDER ALLOWING APPEAL—Filed March 20, 1925

The Eastern Transportation Company feeling itself aggrieved by a final decree entered herein on January 30, 1925, whereby its libel was dismissed upon the ground that the District Court of the United States for the Eastern District of Virginia at Norfolk was without jurisdiction of the controversy in said libel set forth, and having filed with the Clerk of said Court an assignment of errors, doth hereby appeal from the said final decree to the Supreme Court of the United States, for the reasons specified in its assignment of errors, and it prays that this, its appeal, may be allowed and that the question of the jurisdiction of the District Court in said cause and of itse right to award the relief in the libel prayed for may be certified to the Supreme Court of the United States, and that a transcript of the record and proceedings upon which said final decree is based, duly authenticated, may be sent to the said Supreme Court of the United States.

Baird, White & Lanning, Proctors for the Libelant.

Norfolk, Virginia.

Appeal allowed as prayed for.

D. Lawrence Groner, United States District Judge.

[fol. 24] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 20, 1925

Now comes the Eastern Transportation Company by its proctors of record, and having appealed from a final decree of the District Court of the United States for the Eastern District of Virginia at Norfolk entered in the above entitled cause on January 30, 1925,

holding that said Court was without jurisdiction under the provisions of the Act of Congress approved March 9, 1920, known as the "Suits in Admiralty Act," it assigns the following as the errors upon which it intends to rely on said appeal.

The Court erred:

I

In holding it was without jurisdiction of the cause of action in the libel set forth.

II

In sustaining the suggestion of the United States.

III

In failing to over-rule the suggestion of the United States.

IV

In dismissing the libel.

Baird, White & Lanning, Proctors for the Libelant.

Norfolk, Virginia.

[fols 25 & 26] CITATION—In usual form, showing service on Paul W. Kear et al.; omitted in printing

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[fol. 27] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 20, 1925

It is hereby stipulated and agreed that the Clerk of this Court shall make up a transcript of the record in the above entitled cause and transmit the same to the Clerk of the Supreme Court of the United States, to be printed under the supervision of the Clerk of that Court in accordance with Rule 10 of said Court.

Baird, White & Lanning, Proctors for Appellant. H. H. Rumble, Special Assistant in Admiralty to the United States Attorney.

[fol. 28] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 20, 1925

It is stipulated and agreed between counsel for the libelant and the United States of America that:

I

The record herein on the appeal taken by the Eastern Transportation Company from the decree sustaining the exceptions of the United States of America and dismissing the above entitled cause shall consist of:

(a) The libel.

(b) The suggestion of the United States that the Court was without jurisdiction.

(c) The opinion of the Court.

(d) The final order entered January 30, 1925.

(e) The certificate of Hon. D. Lawrence Groner, Judge of the U. S. District Court for the Eastern District of Virginia at Norfolk.

(f) The petition of the Eastern Transportation Company for an appeal.

(g) The Eastern Transportation Company's assignment of errors, and the order allowing appeal.

(h) The citation on appeal.

(i) This stipulation.

II

The aforementioned documents, papers and pleadings constituting the record herein on appeal are true transcripts or copies of the [fol. 29] whole record of the District Court of the United States for the Eastern District of Virginia at Norfolk in the above entitled cause, as agreed upon between the parties, and that none of the pleadings or orders affecting the Seaboard Transportation Company shall be made a part of the record upon the appeal, all proceedings as to said Company having been dismissed for reasons appearing to the Court and to counsel.

Baird, White & Lanning, Proctors for the Libelant. H. H. Rumble, Special Assistant in Admiralty to the United States Attorney, Proctor for the United States of America. Paul W. Kear, U. S. Attorney.

[fol. 30] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the fore-

going is a full and true transcript of the record of the proceedings and judgment of the said Court, as stipulated by counsel, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at Norfolk, in said District, this 3rd day of April, 1925.

Joseph P. Brady, Clerk U. S. District Court, by Paul R. Flanagan, Deputy Clerk. (Seal of U. S. District Court, Eastern Dist. of Virginia.)

Indorsed on cover: File No. 31,018. E. Virginia D. C. U. S. Term No. 351. Eastern Transportation Company, appellant, vs. The United States of America. Filed April 11th, 1925. File No. 31,018.

(26)

FILED

MAY 3 1946

CHARLES E. WYZANSKI, JR.

Supreme Court of the United States

OCTOBER TERM—1945

No. [redacted] 57 A

EASTERN TRANSPORTATION COMPANY,

Appellant,

vs.

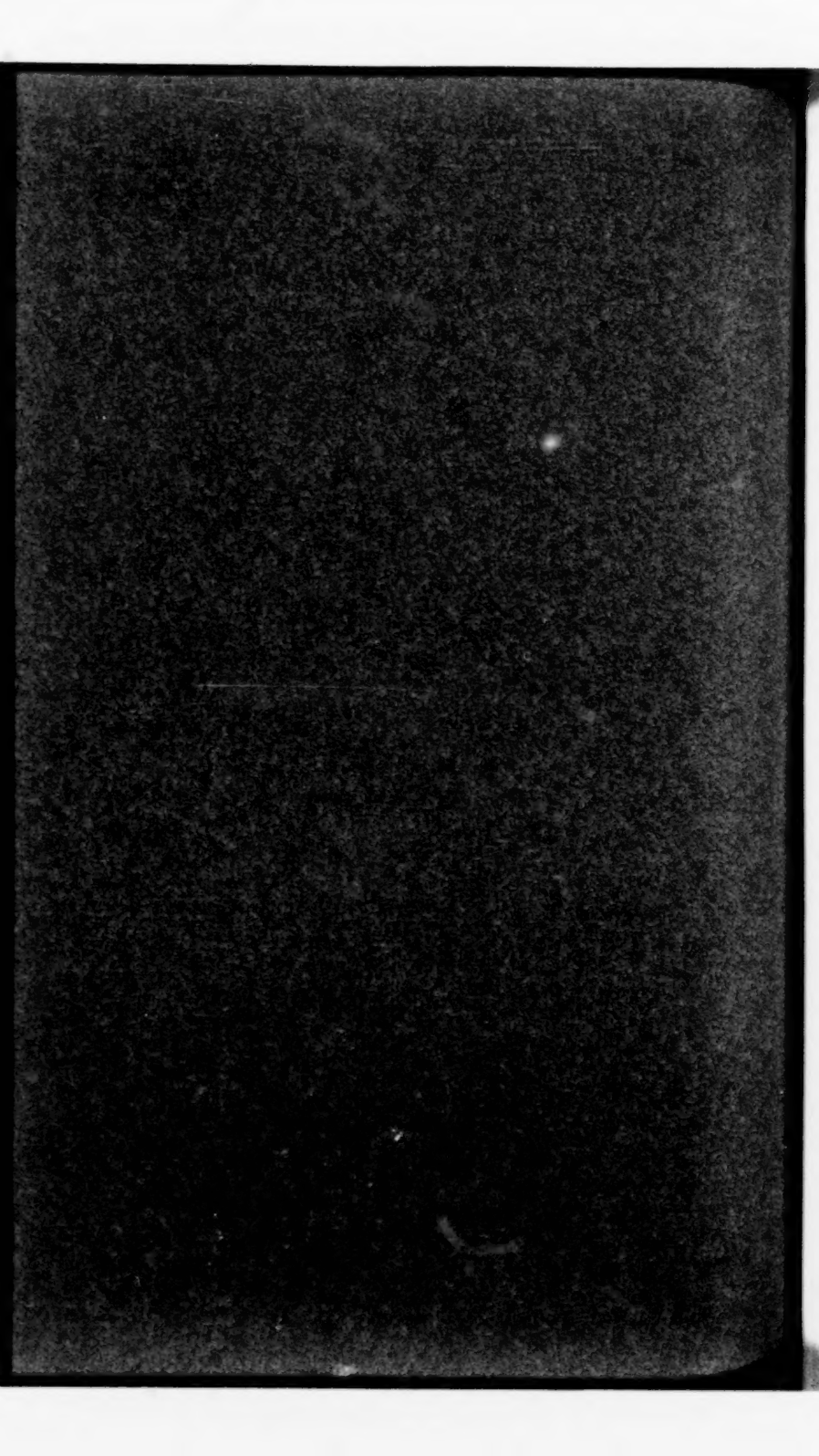
UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR THE APPELLANT.

EDWARD A. HARNETT, JR.,

Counsel for Appellant.



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SUPREME COURT OF THE UNITED STATES.

EASTERN TRANSPORTATION COMPANY, Appellant, *vs.* UNITED STATES OF AMERICA, Respondent.	October Term, 1925. No. 351

BRIEF ON BEHALF OF APPELLANT.

This is an appeal on a question of jurisdiction under the Suits in Admiralty Act of March 9, 1920, taken under the provisions of Section 238 of the Judicial Code on March 20, 1925, before the Act of February 13, 1925, became effective.

The libel in the case was originally brought both against the United States and against the Seaboard Transportation Company.

All proceedings against the Seaboard Transportation Company have been dismissed and, consequently, the case is at an end so far as that company is concerned. *Record*, p. 12.

The libel alleges that the Eastern Transportation Company was the owner of the barge *J. H. Winstead*, and that the United States was the owner of the steamship *Snug Harbor*. *Libel Articles 1 and 2, Record*, p. 1.

On the 15th of August, 1920, the steamship *Snug Harbor* whilst on a voyage between Baltimore, Maryland, and Portland, Maine, came into collision with a barge in tow of the Tug *Covington* owned by the Seaboard Transportation Company.

As a result of this collision the *Snug Harbor* sank at a point about four and a half miles east by north of Montauk Point Light in a frequented channel within the harbor and inland waters of the United States.

The wreck of the *Snug Harbor* was not marked by a buoy or beacon by day or lighted by lantern by night as required by law and was not removed by the United States, and up to the time of the loss of the *Winstead* notice of the presence of the *Snug Harbor* in the said fairway had not been given to the libelant nor had any notice been generally published advising mariners navigating the waters in which the *Snug Harbor* had sunk of her presence there as a wreck.

On the 14th of September, 1920, the barge *Winstead*, loaded with a full cargo of coal, in tow of the tug *Barrallton*, on a voyage from Norfolk, Virginia, to Fall River, Massachusetts, came into contact with the wreck of the *Snug Harbor*, and as a result was sunk and with its cargo became a total loss. *Libel Article 7, Record*, p. 2.

It is further alleged in the libel that the collision in which the steamship *Snug Harbor* was sunk was caused or contributed to by the negligence of the *Snug Harbor*.

It is also alleged that when the barge *Winstead* collided with the wreck of the *Snug Harbor* and, as a result of the collision, became with her cargo a total loss, she was being navigated in a proper and skillful manner, that the presence of the *Snug Harbor* was not apparent to those in charge of the barge and that the contact with the wreck and the consequent loss of the barge *Winstead* were due to the unlawful presence of the wreck in a frequented channel within the harbor and inland waters. *Libel Article 9, Record*, p. 3.

It is further alleged in the libel that, by reason of the premises, the United States is liable for the sinking of

the *Winstead* due to the failure properly to mark the wreck of the *Snug Harbor* or to have it destroyed prior to September 14, 1920. *Libel Article 10, Record,* p. 3.

The Government filed a suggestion of want of jurisdiction and made a motion to dismiss the libel on the following grounds:

1. That the cause of action related to a failure on the part of the United States to perform a purely governmental function and did not constitute a basis of any liability for which the United States would be suable.

2. That the *Snug Harbor* at the time of the collision was not a merchant vessel and that, consequently, the libel did not come within the jurisdiction of the Suits in Admiralty Act of March 9, 1920.

3. That there is not any right of suit *in personam* under the said Suits in Admiralty Act, and inasmuch as the *Snug Harbor* was lost those damaged by striking her wreck were without any remedy.

4. Finally, that the Wreck Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked or sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night has no application to the United States of America, imposes no duty on them and creates no liability for which they are suable. *Suggestion, Record,* pp. 4, 5.

This motion to dismiss was very fully argued before Judge Groner and on September 30, 1922, after holding the matter under consideration, he rendered a decision in which he sustained the libel and denied the motion to dismiss.

Opinion, Record, pp. 6-8. *The Snug Harbor,* 283 Fed. 1015.

Some time afterward Judge Groner ordered a reargument, and reconsidered the case and on January 30, 1925, he entered a decree dismissing the libel on the ground that at the time the *Snug Harbor* was sunk she had become a total loss, and that consequently the Court was without jurisdiction. *Judgment and Order dismissing Libel, Record,* p. 9.

When Judge Groner's original opinion sustaining the libel is read it will be seen that he had in that decision really reserved the question as to whether the *Snug Harbor* was really a total loss and its effect on the jurisdiction to be determined on the facts at the trial.

Consequently, his short decree entered on January 30, 1925 reversing his previous ruling and finally dismissing the libel, was in effect a holding that there could not be a libel *in personam* against the United States under the Suits in Admiralty Act when, owing to the loss of the vessel, a proceeding *in rem* could not have been maintained.

The appellant contends that this construction of the Suits in Admiralty Act is erroneous.

The usual certificate that the decision was based on a question of jurisdiction only was given by Judge Groner. The petition for appeal was allowed. *Record,* pp. 9, 10.

Appropriate assignments of error were filed, *Record,* pp. 10-11, assigning error on the ground that the Court held it was without jurisdiction against the United States under the circumstances set forth in the libel, and in that the Court dismissed the libel on that ground.

The clean cut question, therefore, is raised in this

Court—it is believed for the first time*—whether under the Suits in Admiralty Act of Mar. 9, 1920 the United States can be held liable in a proceeding in admiralty *in personam* in a case in which a private owner would have been held liable, although by reason of the loss of the vessel which caused the damage a proceeding *in rem* would not have been possible.

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* The following are the cases in which the Suits In Admiralty Act has come before this Court:

The Western Maid (January 3, 1922), 257 U. S. 419, held that a vessel, while engaged in the *public* service, was not liable under the Act.

Blamberg Bros. vs. *United States* (January 2, 1923), 260 U. S. 452, held that when the United States was not liable personally under the Maritime Law and when the vessel which was the cause of the liability was not itself within the United States, no action could be maintained, because an action *in personam* could not be maintained if the suit were against a private owner, and no action could be maintained *in rem* against a vessel outside of the jurisdiction.

James Shewan & Sons, Inc., vs. *United States* (November 17, 1924), 266 U. S. 108, held that the mere fact that a vessel was laid up and out of use when an action was begun did not prevent its maintenance, provided that the vessel had been used as a merchant vessel when the cause of action against the United States arose.

Nahmeh vs. *United States* (March 2, 1925), 267 U. S. 122, held that when a vessel was within the United States, a proceeding *in rem* could be maintained either in the district where the vessel was lying, or, under the Act, in the district where the libelant resided; moreover, that the Suits In Admiralty Act should be liberally construed.

Doullut & Williams Co., Inc., vs. *United States* (April 13, 1925), 268 U. S. 33, followed *The Blackheath*, 195 U. S. 361, and *The Raithmoor*, 241 U. S. 166, and held that an action could be maintained against the United States under the Suits In Admiralty Act for injuries done to piling standing in the Mississippi River by vessels owned by the United States and used as merchant vessels.

The legislative history of the Act is set forth in full as Appendices I and II hereof. The Act in its final form is given as Appendix III.

FIRST POINT.

THE DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA HAD JURISDICTION OF THIS PROCEEDING AGAINST THE UNITED STATES BECAUSE UNDER THE SUITS IN ADMIRALTY ACT OF MARCH 9, 1920, THE UNITED STATES CONSENTED TO BE SUED IN ANY PROCEEDING IN ADMIRALTY IN WHICH SUCH A PROCEEDING COULD HAVE BEEN MAINTAINED AGAINST A PRIVATE SHIPOWNER.

I. When the Shipping Board was created by the Shipping Act of 1916, and the United States decided to go into the business of operating merchant ships, it was provided by Congress that the ordinary liabilities of private merchant vessels should apply to such Government owned merchant vessels.

In Section 9 of the Shipping Act, 1916, it is provided:

> "Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

In the case of *The Lake Monroe,* 250 U. S. 246, it was held that this section entitled "a private person damaged by the act of a Government vessel to proceed against that vessel *in rem* provided she was employed at the time of injury as a merchant vessel."

The provision above quoted of Section 9 of the Shipping Act, 1916, was re-enacted in Section 18 of the Merchant Marine Act, 1920.

By these Acts, therefore, the liabilities of Government owned merchant vessels were the same as those of privately owned merchant vessels.

II. After these Acts had been in operation for some time and after the decision of *The Lake Monroe*, 250 U. S. 246, it was realized that it might be a serious inconvenience to the Government to have its vessels delayed by arrests and subject to the requirement that they give bonds as a condition of their release.

This situation resulted in the passage of The Suits in Admiralty Act of March 9, 1920.

This Act made Government owned vessels when operated as merchant vessels or tugs responsible on the same basis as if they were being operated by a private owner.

The Suits in Admiralty Act abolished the right to arrest Government vessels by proceedings *in rem* and allowed "*a proceeding in admiralty*" to be maintained against the United States by libel *in personam*, with the proviso that if the libelant wished so to elect it might proceed in this libel against the Government on the same principle as if the libel had been a libel *in rem*, and the ship had been arrested.

But such election was not to preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

The relevant provisions of the Suits in Admiralty Act are as follows (italics ours):

> "Sec. 1. That no vessel owned by the United States or by any corporation in which the United

States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, that this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owner or operated, or if such cargo were privately owned and possessed, *a proceeding in admiralty* could be maintained at the time of the commencement of the action herein provided for, *a libel in personam may be brought against the United States* or against such corporation, as the case may be, *provided that such vessel is employed as a merchant vessel* or is a tug boat operated by such corporation. • • •

Sec. 3. *That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.* • • • Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. • • • *If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned or possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit.*

Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels."

It is perfectly clear from this language

1. That what was implicit in the Shipping Act of 1916 and the Merchant Marine Act of 1920, as to the legal status of the Government and of Government owned or operated vessels whilst employed as merchant vessels was made explicit by the Suits in Admiralty Act, and

2. That under the Act "*proceedings in Admiralty*" were to be maintainable against the United States when its liability arose out of the operation of one of its vessels as a merchant vessel, and

3. That by such proceedings all liabilities imposed by law on private persons similarly engaged could be claimed against the United States with correlative rights in the United States to avail itself of all defenses and limitations of liability available under Admiralty Law and Practice to a private owner.

It may perhaps be appropriately emphasized here that the condition of the right to sue the United States is that a "*proceeding in admiralty*" could be maintained in a similar suit against a *private person.*

There is not any limitation on the phrase "*proceeding in admiralty.*"

It is not limited to a proceeding in admiralty *in rem* which would mean a case where a maritime lien would have

been created against the vessel in question if she were held responsible for the tort or breach of contract which might be involved in the case.

It may be appropriate, therefore, here to consider what a "*proceeding in admiralty*" is.

The rules of practice in admiralty promulgated by this Court on December 6, 1920, to take effect on March 7, 1921, deal in the first ten sections with "*Proceedings in Admiralty*".

The first rule deals with conditions precedent to the issuance of any process in Admiralty.

The second rule deals with process in suits *in personam.*

The fifth rule deals with bonds in attachment suits *in personam.*

The eighth rule deals with the reduction of appeal bonds or stipulations and new sureties in suits either *in rem* or *in personam.*

The ninth rule deals with monitions to third parties in suits *in rem* against vessels.

The tenth rule deals with process in suits *in rem.*

Rules thirteen to eighteen deal with the joinder in one libel of suits *in rem* against the appropriate *res,* and suits *in personam* against the party sought to be held personally liable.

Thus the rules of this Court promulgated in pursuance of the statutory authority given to it under the provisions of the Act of August 23, 1842, and which consequently have the force of law recognize throughout that a *proceeding in admiralty* is not limited solely to proceedings *in rem.*

The Admiralty Rules above referred to have been

printed for the convenience of the Court as Appendix V hereof.

Many examples of recent *proceedings in admiralty* which have come before this Court of both kinds are the following:

Proceedings *in personam*:

Watts, Watts & Co., Ltd. v. *Unione Austriaca, etc.*, 248 U. S. 9;
Texas Company v. *Hogarth Shipping Co., Ltd.*, 256 U. S. 619;
Standard Oil Co., as Owner of S. S. *Llama* v. *United States*, 267 U. S. 76;
Littlejohn & Co. v. *United States*, Decided Mar. 1, 1926.

Proceedings *in rem*:

The Kronprinzessen Cecilie, 244 U. S. 12;
Piedmont & Georges Creek Coal Co. v. *Standard Fisheries Co., Claimant of various Fishing Steamers*, 254 U. S. 1;
The Barnstable, 181 U. S. 464;
The Folmina, 212 U. S. 354;
The Gul Djemal, 264 U. S. 90.

Another recent litigation in this Court in which in a series of five cases involving the same vessels, some were *in rem* and some *in personam*, is the case of *The Murmugao*, 264 U. S. 105.

In addition to these cases, each of a distinct kind, are the limitation of liability cases which are often stated to involve both *in rem* and *in personam* proceedings although

perhaps they are not properly to be included in either category.

Recent cases of this kind are:

Standard Oil Co. v. *Southern Pacific Co.*, 268 U. S. 146.

East River Towing Co., Inc., Owner of Tug Edwards, 266 U. S. 355.

We have not sought to make an exhaustive list of these cases but all of them are *proceedings in admiralty* which have been recently before this Court and which illustrate as do the rules of this Court beyond peradventure the fact that the expression a "*proceeding in admiralty*" is not limited to a proceeding *in rem*.

That a proceeding *in rem* is advantageous to a libelant in certain cases is, of course, quite obvious, for there are many cases in which the personified ship herself is held liable under our law when her owner would not be liable.

Cases of this kind, for example, are the celebrated cases of:

The China, 7 Wall. 53 (1868) where a vessel was held liable for the negligence of a compulsory pilot.

The Brig Malek Adhel, 2 How. 210 (1844) where a vessel was held liable for the acts of a master who had turned pirate.

In *The China*, 7 Wall. 53, the owners would not have been held in an action *in personam*, for damages due to the fault of a compulsory pilot, as was shown by the subsequent case of

Homer Ramsdell v. *Compagnie Generale Transatlantique*, 182 U. S. 406, 414.

The Barnstable, 181 U. S. 464, was a case where a steamer vessel under a bare boat or demise charter in which the charterers employed and paid the crew was held liable *in rem* for a collision although her owners, of course, could not have been held personally liable.

Workman v. *The Mayor,* 179 U. S. 552, is also a very interesting case in connection with the situation in the instant case because it was there held that while, of course, the Municipal owner of a fireboat could not on grounds of public policy have his vessel arrested *in rem* for a collision he would nevertheless be liable *in personam* for negligent navigation of the fireboat.

The cases just discussed were proceedings *in rem* and show why the option was given to the libelants in the Suits in Admiralty Act to have their libels maintained according to the principles of suits *in rem.* It conformed the situation to that of private litigants.

Of course when the proceeding can *only* be maintained *in rem* if the vessel were privately owned, and the owner of the vessel would not be liable *in personam,* then you have a situation such as existed in the case of *Blamberg Bros.* v. *United States,* 260 U. S. 452, where the United States owned a barge and chartered her under a bare boat or demise charter, under which the charterer was the operator, and the vessel was not within our jurisdiction.

In that case, if the vessel had been owned privately and been within the United States, she would have been sued *in rem* as in the case of *The Barnstable,* and would have been held liable *in rem* when there was not any possible claim against her owner *in personam.* What was really decided in the Blamberg case was, that the Suits in Admiralty Act did not authorize a suit *in personam* against the

United States as a substitute for a libel *in rem* against a vessel, when

(1) The vessel was not available in a port of the United States and subject to the process of our Courts, because in such a case the vessel of a private owner could not have been arrested; and

(2) When the private owner would not have been liable to personal suit.

III. The Suits in Admiralty Act constituted, therefore, a consent on the part of the United States to be sued in any admiralty proceeding in which a private owner would be liable provided the vessel through which the liability arose was operated as a merchant vessel.

This is a recognition of the feeling frequently expressed that when the Government goes into business it should assume the same liabilities as others.

This has been recognized and referred to in the old as well as in the recent cases in which the courts have acted upon claims for immunity on behalf of government owned ships. Perhaps the rule is nowhere better stated than in *The Charkieh,* L. R. 4 A. & E. 59, which though subsequently reversed remains the statement oftenest referred to as the proper and enlightened rule. It was there held that if a Sovereign assumes the character of a trader, and sends a vessel belonging to him to this country to trade here, he must be considered to have waived any privilege which might otherwise attach to the vessel as the property of a Sovereign.

In the case of *Walton* v. *United States,* 24 Court of Claims, 372, 379, Senator Hoar is quoted as having said:

"* * * we are of opinion that there are two classes of cases where sound public policy requires the United States and all other sovereign governments to hold themselves responsible for injuries occasioned by the negligence of their agents. One is where the Government, through its agents, manages or controls property from which it receives a benefit or profit. * * *

"Another class of cases where this responsibility is recognized is where the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens, and where the security of the citizens requires that the same obligation shall rest upon them and that it shall be enforced by similar responsibility as in the case of private persons. Congress has always recognized the obligation of the Government for injuries occasioned by the fault of the officers of its naval and other vessels in maritime collisions."

In the opinion in *St. Louis* v. *United States,* 33 Court of Claims, 251, 269, the Court says:

"Cases of injury occasioned by Government agents on the water are peculiarly within the rule of responsibility."

The Suits in Admiralty Act, therefore, gave statutory sanction to a feeling that has been constantly growing that the doctrine of governmental immunity is not a doctrine which is in consonance with modern ideas.

Since Judge Groner made his first decision in this case there have been a number of decisions in the Lower Courts which sustain the libelant's position that an *in personam action* will lie against the United States under the Suits in

Admiralty Act even if an *in rem* action which must be founded on a maritime lien would not be maintainable if the vessel in question were privately owned.

These cases and the dates of their decisions are as follows:

In *Middleton & Co.* v. *United States* (D. C. E. D., So. Car., May 19, 1921), 273 Fed. 199; 286 Fed. 548, a suit was brought for damages for delay in the transportation of cargo. The vessel was outside of the district where suit was brought. In the first action, Smith, D. J., permitted the libel to be amended to state a cause of action *in personam*. In the second action recovery was had against the United States on this libel.

An appeal on the merits was taken to the Circuit Court of Appeals for the Fourth Circuit, 3 Fed. (2d) 384. The Government did not attempt to appeal on the jurisdictional question.

The Elmac (D. C. S. D., N. Y., June 26, 1922), 285 Fed. 665, was a suit *in personam* for damages for the breach of a charter party, in that the vessel failed to be ready to receive cargo in accordance with the charter. In this case no liability *in rem* could arise because the libelant's merchandise was never placed aboard the vessel and the charter was cancelled by the libelant pursuant to its terms because the ship was not in readiness to receive it. It was held by Learned Hand, D. J., that such a suit would lie, and in order to permit such a suit to lie he allowed the libel to be amended to show the residence of the libelant.

In *Agros Corporation* v. *United States* (Dist. Ct. S. D., N. Y., October 11, 1922), 8 Fed. (2d) 84, the question of jurisdiction came up on respondent's exceptions to a libel

in the Admiralty. The case raises only one question: Whether under the Act of March 9, 1920 (Comp. St. Ann. Supp. 1923, Sections 1251¼-1251¼L), a libelant may sue the United States *in personam* upon a maritime claim which would be cognizable by an admiralty court between private persons, or whether that act is limited to suits *in rem.* The question arose upon exceptions to interrogatories annexed to the libel and designed to draw out the relation of the United States to the vessel; *i. e.,* whether there was a personal obligation of the United States from her failure to perform a contract of carriage.

Judge Learned Hand said:

> "I think that it is impossible to read the Suits in Admiralty Act (March 9, 1920), without concluding that Congress intended to provide for suits which are in the nature of in personam as well as in rem. In the first place, although the statute is drawn by persons entirely familiar with the usages and terms of the admiralty, Section 2 (Comp. St. Ann. Supp. 1923, Sec. 1251¼A), which confers the right, speaks, not of a libel in rem, which was the natural phrase if the respondent be right, but of 'a proceeding in admiralty.' Whenever such a proceeding 'could be maintained,' if the 'vessel were privately owned or operated,' 'a libel in personam may be brought.' The statute appears, therefore, to speak sub specie generale.
>
> "The history of the act strongly corroborates this conclusion, as will appear in a moment. Furthermore, even if Section 1 (Comp. St. Ann. Supp. 1923, Sec. 1251¼), which enacts that the remedy in personam is to be a substitute for the right given by the Act of 1916 to arrest United States ships, raises a doubt upon this interpretation, the later sections lay it. Thus in Section 3 (Comp. St. Ann. Supp. 1923,

Sec. 1251¼B) the libelant may elect to proceed with his libel as in rem, if there be a lien, though, of course, without arrest. What can such an election be, if he have only that right? This is not even left to implication, because his election is not to deprive him 'from seeking relief in personam in the same suit.' 'In personam' does not refer to the form of the libel, since that must be 'in personam' anyway, all arrests being forbidden. It seems hardly necessary to argue that it refers to relief which could be given in personam against a private person, and thus necessarily presupposes that such relief is open to any libelant in a proper case.

"Finally, section 6 (Comp. St. Ann. Supp. 1923, Sec. 1251 1/4e) grants the same 'exemptions' and 'limitations of liability' to the United States as to private owners. Allowing that 'exemptions' is an indefinite word, 'limitations of liability' can scarcely mean anything but the limitation which has been given to shipowners for 70 years. It applies necessarily to rights in personam, and, since the act is technically drafted, would have been quite meaningless, unless suits in personam had been understood to be included.

"The respondent's argument is plausible, based upon the main purpose of the act, i. e., to create a substitute for the earlier right of arrest, and this is reinforced by the reports of the legislative committees. However, there appears to me a conclusive answer to any such argument in the history of the Act in Congress. The original draft of section 2 read as follows: 'The United States * * * may be sued in personam * * * in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where, if a vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or

cargo could be arrested or attached at the commencement of the suit.'

"Thus it appears that the final form of section 2 —i. e., 'a proceeding in admiralty'—was a substitute for an express grant of jurisdiction as well over suits in personam as over suits in rem. Now it seems to me flatly impossible to suppose that, when Congress made the change from the enumeration of these two kinds of suits to a general phrase fitted to include both, it intended to cover only one of the two enumerated. Having shown its prior purpose specifically to include both, and having finally selected less cumbersome language naturally including both, how can it be argued that it meant to cover only one which it had shown that it knew how to express accurately when it chose?

"While the case is of first impression, so far as any judicial intimations have gone, they are in accord. Middleton & Co. *v.* U. S. (1921; D. C.), 273 F. 199, 200, 201; Blamberg Bros. *v.* U. S. (1921; D. C.), 272 F. 988, 979, affirmed by Supreme Court 1923 A. M. C. 50, 260 U. S. 452, 43 S. Ct. 179, 67 L. Ed. 346.

"The exceptions to the interrogatories are overruled; the other exceptions were disposed of at the argument."

The Isonomia (C. C. A., 2nd Cir., November 24, 1922), 285 Fed. 516, was a case in which the libelant elected to proceed in accordance with the principle of libels *in rem*, but in the course of the decision, which was written by Judge Rogers, it became necessary to ascertain whether or not if the *Isonomia* had been privately owned instead of being owned by the United States any suit against her would lie except in the district where she was found. The

Court held, therefore, that the proceeding *in rem* would fail, but at page 521 it most plainly indicated its opinion that if recovery had been sought in an action purely *in personam,* it would have been allowed.

Judge Rogers said at p. 521:

> "* * * The United States being everywhere within their territory, the libelant may sue in personam in the district where he resides and obtain jurisdiction of the respondent, or he may sue in rem where he finds the vessel without concerning himself with the whereabouts of the owner. But where there exists solely the liability of the vessel and no liability of the owner, the libelant must sue under the Act of 1920, as prior to the act, only in the district in which he finds the vessel.
>
> "We arrive at that conclusion, as we are convinced that the purpose of the act was to place the United States on exactly the same footing as a private party. That this was the intent appears from the language of section 2, declaring 'that in cases where, if such vessel were privately owned or operated,' a proceeding in admiralty could be maintained 'at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States,' provided the vessel was employed as a merchant vessel, etc. We understand this to mean that, where no right of action would exist between private parties, none would exist against the United States; and in the instant case it is admitted that, had the *Isonomia* been privately owned, instead of by the United States, no suit against her, on the cause of action alleged in the libel, would lie, except in the district where she was found.
>
> "The general language of the provision as to venue found in section 2, as of every part of the act

> of 1920, must be read in the light of the legislative intent so far as that intent is clearly expressed. Read in the light of that intent, we construe the provision giving permission to sue wherever libelant lives or has its principal place of business relates to those cases in which the proceeding is one which in its origin is essentially *in personam*, and that it does not extend to cases in which the proceeding is one which in its origin is essentially *in rem*, but in which the United States is made by virtue of the act suable *in personam*. * * *"

In *Grays Harbor Stevedoring Co.* v. *United States* (D. C. W. D. Wash. February 17, 1923) 286 Fed. 444, recovery was sought for stevedoring services furnished to two vessels owned by the United States, and the libelant elected to have the suits proceed in accordance with the principles of libels *in rem*. As these libels were defective, it was held by Cushman, D. J., that they might be amended to state a cause of action purely *in personam*.

In *The Anna E. Morse* (D. C. S. D. Ala. March 21, 1923) 287 Fed. 364, a libel was filed to recover sums of money which, it was claimed, were paid out by the libelant for the benefit of the vessel while she was loading in Mobile and which, it was claimed, created a lien upon the vessel. An exception was filed because the libel failed to allege that the vessel was within the jurisdiction of the Court. In a well considered and carefully reasoned opinion, Ervin, D. J., reached the same conclusion as this Court later reached in *The Quinnipiac*, 267 U. S. 122. He specifically declined to follow the limitations laid down in the *Isonomia* and, interpreting the Act with the same care as Benedict in his work on Admiralty, 5th edition, Sec. 194, and Judge Learned Hand, in *Agros Corporation* v. *United States*,

8 Fed. (2d) 84, came to the conclusion that the Act permitted suits purely *in personam*.

Judge Ervin said, at p. 366:

> "A careful reading of the act indicates that, while the primary purpose was to prohibit the seizure of the vessels and cargoes, Congress, when it gave the right to proceed in personam in lieu of the right of seizure, did not stop there, but also gave the right to proceed in personam against the government and such corporation, wherever such right would have existed against the owner had the vessel been privately owned. This intimation is found first in the words 'a proceeding in admiralty may be maintained,' etc., as found in the second section, instead of the words 'a seizure in admiralty could be had,' the words 'proceeding in admiralty' being much broader than the word 'seizure,' and the words 'a proceeding' certainly include a proceeding in personam as well as a proceeding in rem.
>
> "The fact that the right to proceed in personam against the government, where the right to proceed in personam against the owner of a vessel would have been had, had the vessel been privately owned, seems to be necessarily conceded by the following words found in the third section of the act:
>
> " 'If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit.' "

In *Thompson* v. *United States*, (D. C. S. D. Ala., May 16, 1923) 4 Fed. (2d) 412, Judge Ervin permitted a recovery

in this same case on the merits, but, on the facts, held that the libelant was entitled to a lien.

In *The Faraby* (Dist. Ct. S. D. N. Y. March 23, 1923) 1923 A. M. C. 468 (not reported elsewhere) a libel for salvage was brought against the United States but, since the vessel was not within the district under the Eighteenth Admiralty Rule, the libel for salvage was brought *in personam* against the United States as the person liable. It was held by Goddard, D. J., that such a libel would lie and the exceptions to it were overruled.

Judge Goddard said at p. 470:

> "* * * It cannot be the rule that a libel *in personam* only lies in case the vessel is within the borders of the United States, although the libel *in rem* does not lie unless she is within the waters of the district. The *Isonomia* means that in cases of libels *in personam* which would not between individuals require the presence of the vessel anyway, a libel may be filed in the district of the libellant's residence. The only escape from this result would be in case it were held that the Suits in Admiralty Act was intended to give no remedy except in cases where there was a maritime lien. The contrary was distinctly held in the *Isonomia* and is certainly not distinctly overruled in *Blamberg* vs. *U. S.*"

In *The Tug Nonpareil* (D. C. S. D. N. Y. December 27, 1923) 1924 A. M. C. 312 (not reported in the Federal Reporter) the United States was impleaded under the 56th Rule in Admiralty in a collision case. After the collision but before the suit was brought, the vessel was sold to foreigners, and the United States, appearing specially, moved to dismiss the impleading petition. It was held by Judge Ward that the United States might be impleaded, in accord-

ance with the general permission to sue it given by the Act, like any private party, and he held that since the owner of the vessel would be liable *in personam* for the collision, the impleading petition was good. In this suit recovery against the United States was permitted.

Judge Ward said at pp. 314-316:

> "I think the United States has consented to be sued either *in rem* or *in personam* where a vessel or a private owner could be sued, provided the vessel was owned or operated by the United States as a merchant vessel. * * *"
>
> "On the other hand if suit could be maintained against a privately owned vessel or against her owner, then the libellant has an election to proceed against the United States either in accordance with the principles of suits *in personam* or of suits *in rem*. * * *"
>
> "The first section of the Act prohibits the actual seizure of any vessel or cargo belonging to or in the possession or control of the United States or operated by or for the United States. The consideration, so to speak, for the prohibition is the consent of the United States to be sued *in personam*, as provided in sections 2 and 3 in respect to any vessel as to which a private owner or a vessel privately owned could be sued, provided it is employed as a merchant vessel by the United States.
>
> "It is a mistake to suppose that the Supreme Court in the case of *Blamberg* vs. *United States*, 260 U. S. 452, 1923 A. M. C. 50, or the Circuit Court of Appeals of this circuit in *The Isonomia*, 1923 A. M. C. 132, held that if a vessel which would be liable *in rem* if privately owned were not within the district no suit could be maintained against the United States *in personam*. In the Blamberg case the United States was under no personal liability whatever, because

the vessel in question was at the time the cause of action arose in the sole possession and control of the chartered owner and was at the time of suit brought in Havana and therefore a suit against the United States *in personam* could not be maintained. In the case of the *Isonomia,* the court held that a suit *in personam* could not be maintained for the reason that the libellant had sued because of a lien upon the vessel and had elected, in the language of the court, 'that this libel shall proceed in accordance with the principles of libels *in rem,*' and such a suit could be maintained only in the district court for the district 'in which the vessel or cargo charged with liability is found.' This was in strict accordance with the language of Mr. Justice Taft in the Blamberg case, viz., 'all we hold is that the district court was right in construing the second section of the Suits in Admiralty Act not to authorize a suit *in personam* against the United States as a substitute for a libel *in rem* when the United States vessel is not in a port of the United States or of one of her possessions.' " * * *

"* * * The purpose of the Act was to give libellants the same rights against vessels operated by the United States as merchant vessels that they would have against vessels privately owned and certainly the liability of the owner of a private vessel *in personam* would depend upon his ownership at the time the cause of action arose and it would make no difference who owned the vessel nor where she was when suit was brought. * * *"

In *The Castlewood* (D. J. E. D. Penn., April 10, 1924) 298 Fed. 184, a suit was brought to recover for repairs performed to the Steamship Castlewood. The libel contained two counts. Under the first, the libelant elected to proceed in accordance with the principles of suits *in rem,* and in

the second, to proceed *in personam,* as upon an account stated. Thompson, D. J., held that under the facts no lien would have arisen as between private parties, but he permitted a recovery *in personam.*

An appeal on the merits was taken to the Circuit Court of Appeals for the Third Circuit, 5 Fed. (2d) 1013, and the decision below was affirmed. The Government did not attempt to appeal on the jurisdictional question.

The Brush (D. C. N. D. Cal., December 15, 1925), 1926 A. M. C. 91 (not elsewhere reported), is somewhat similar in principle to the case at bar. Suits *in personam* were brought against the Government for failure to deliver cargo. The goods in each case originated in San Francisco and were to be carried to seaports on the Atlantic coast. They were not delivered at their destination, but were in fact, lost with the vessel, through an error of navigation upon the coast of Oregon.

It was expressly urged by the United States that it ought not to be held liable, since the Suits in Admiralty Act did not comprehend the principle of suits *in personam* when no lien against the vessel existed and where, accordingly, a suit *in rem* could not have been brought if the vessel had been privately owned. Kerrigan, D. J., squarely held that the libelant was entitled to decrees against the United States.

Judge Kerrigan said at p. 97:

> "After due consideration, I am inclined to agree with Judge Learned Hand, who in *Agros Corporation* vs. *United States,* 1923 A. M. C. 542, said, 'I think that it is impossible to read the Suits in Admiralty Act without concluding that Congress intended to provide for suits which are in the nature of *in personam* as well as *in rem.*' His views are in accord

with those of the author of the latest edition of Benedict on Admiralty, 5 Ed. Sec. 192, and seem to me to be well founded."

In the 5th edition of Benedict on Admiralty, the learned editor writes as follows in Section 194 in a passage which accurately analyzes the provision of the Suits in Admiralty Act:

> "The Act authorizes suit where, if the merchant vessel or Shipping Board tug were privately owned or operated or the cargo private owned or possessed, 'a proceeding in admiralty could be maintained at the time of the commencement of the action' provided for in the Act. The Act does not say 'where a libel *in rem* could be maintained' but reads 'a proceeding in admiralty,' a generic term embracing in its natural connotation actions *in rem* and actions *in personam*, both of which were separately specified in the original draft for which the final form of Sec. 2 has substituted a single but inclusive phrase. Equally clear is the implication of the provision in Sec. 3 that election to proceed upon the principles of libels *in rem* shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit. In safeguarding the right to relief *in personam* when conjoined with a claim on the principles of actions *in rem*, this clause necessarily contemplates that the right which such election is not to prejudice exists independently of that election. The provision of Sec. 6 that the United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to owners, etc., contemplates actions asserting a personal liability. The provision in Sec. 3 that suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice

obtaining in like cases between private parties and the further provision for an election to proceed in accordance with the principles of libels *in rem*, sufficiently show both from the contradistinction of phrase and from the inherent sense of an election that the Act is not confined to the application of the principles of libels *in rem* to the form of a proceeding *in personam*. It has been urged that the Act should be construed as merely affording a remedy *in personam* where suit might have been maintained *in rem* under Sec. 9 of the Act of September 7, 1916. But whereas the earlier Act clearly showed an intention not to create a liability of the United States *in personam*, the present Act not only substitutes a right of action *in personam* for one *in rem* but is replete with suggestions of rights *in personam* independent of any right *in rem* in cases of private ownership or under the Act of September 17, 1916. * * *"

It seems, therefore, perfectly clear that to contend, as was done in the Court below, on behalf of the appellee that the Suits in Admiralty Act does not allow the Government to be sued in tort would be to fly in the face of the very wording of the Act and in the face of the provisions of the rules of this Court hereinabove cited.

Proceedings in admiralty are permitted by the Act against the Government if the operation of the vessel in question as a merchant vessel was the occasion of the accident, or breach of contract.

Proceedings in admiralty may be based on maritime torts or on maritime contracts. There is not any distinction made in the Suits in Admiralty Act between tort and contract.

It should be noted in this connection that the Tucker Act of 1887, which created the Court of Claims and gave

concurrent jurisdiction to the District Court for small claims against the United States provided that the United States should be suable under that Act only for "cases not sounding in tort."

It is perfectly clear that if the Suits in Admiralty Act had intended to limit the Government to "cases not sounding in tort" they would have used the appropriate language often considered by the Federal Courts in connection with the Tucker Act.

An instance where the United States has been held liable for a maritime tort under the Suits in Admiralty Act is the following:

The Tug Nonpareil (D. C., S. D. N. Y., December 27, 1923), 1924 A. M. C. 312 (not reported in the Federal Reporter), was a case where the United States was impleaded under the 56th Rule in Admiralty in a collision case. After the collision but before the suit was brought, the vessel was sold to foreigners, and the United States, appearing specially, moved to dismiss the impleading petition. It was held by Judge Ward that the United States might be impleaded in accordance with the general permission to sue it given by the Act, like any private party and he held that since the owner of the vessel would be liable *in personam* for the collision, the impleading petition was good. In this suit recovery against the United States was permitted.

Thus the Suits in Admiralty Act does not impose on the United States any liability under which a private ship owner would not labor, but it does impose just the same liabilities.

For example, suppose that a vessel of the United States, employed as a merchant vessel, ran down and sank a

privately owned vessel and the private owner sued the United States for damages. If it should be found that the United States was privy to the fault, under the Suits in Admiralty Act, the full damages to the owner of the private vessel could be recovered. That seems to be perfectly clear by the wording of the statute. Otherwise, the United States would not be in the same position as the private owner in which the statute expressly placed it.

And so here, the United States is liable in full to the libelants because it is not in a position, owing to its personal fault in failing to mark the wreck, to claim any limitation of liability.

The Drill Boat No. 4, 233 Fed. 589.

Also, if the United States brings the first action in a collision case and there is a cross libel filed, as in several cases which have been before this Court, there is no question but that the United States is being held liable *in personam* for tort in the event it is held wholly or partly to blame.

It would seem, therefore, that the argument made on the Government's behalf below to the effect that the United States has not consented to be sued in tort was an argument that was raised purely for the benefit of the present case and if founded on anything was founded on a misreading of the decision in *The Western Maid* cases.

The Suits in Admiralty Act allows suits in admiralty for damages done by merchant vessels owned by the Government when used as such, but it does not extend the consent of the Government to be sued to torts committed by vessels engaged in governmental public service. That was what Mr. Justice Holmes referred to in his remarks in *The Western Maid* group of cases.

As we remember, Government counsel, below, in his argument emphasized the statement of Mr. Justice Holmes, reading it outside its context. That statement, we submit, will apply only to the acts of vessels in the public service of the United States employed in some *public governmental capacity.*

Indeed, to claim that the Suits in Admiralty Act did not allow the Government to be sued for tort would be to disregard not only the very wording of the Act, but its legislative history, which is to be found in Appendix I.

SECOND POINT.

A PRIVATE OWNER WOULD HAVE BEEN LIABLE TO THE LIBELANT FOR THE DAMAGES CAUSED BY HIS LEAVING THE WRECK OF *The Snug Harbor* UNBUOYED AND UNLIGHTED IN A FREQUENTED FAIRWAY.

I. AT COMMON-LAW THERE WAS AND IS A LIABILITY ON THE PART OF A WRECK SUNK IN NAVIGABLE CHANNELS AND ITS OWNER FOR DAMAGE CAUSED BY THE WRECK TO OTHER VESSELS UNLESS HE SHALL HAVE PROPERLY MARKED IT OR ABANDONED IT.

In both the United States and England, there seems to be recognized a general doctrine that where through an unavoidable accident, a vessel is sunk in navigable channels, the owner, if he abandons possession and control, is under no obligation to protect other vessels from receiving injury through such wreck but *before* he abandons such possession and control, "he is bound to exercise an ordinary and reasonable degree of diligence and dispatch either in removing it or in preventing its doing injury to others.

He is as much bound to use care in the control of his vessel while it is under water as while it is above water."

Shearman and Redfield on Negligence, 4th Ed. Vol. 2, Section 738.

In the United States there is a clear statutory duty which has been in effect since 1899. Act of March 3, 1899, Section 15, (30 Stat. 1152, C. 425). This section provides, that "whenever a vessel, raft, or craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do, shall be unlawful. * * *" There are a great many decisions before and since the date of this Act, covering the right of a vessel colliding with the wreck to hold the owners of the wreck for damages where the owner failed to properly mark the wreck.

It was stated by Ward, J., sitting in the Circuit Court of Appeals, Second Circuit, in 1915, in *The Plymouth*, 225 Fed. 483, in interpreting the above statute that:

> "Without any statute, the law lays this obligation upon every owner who does not abandon a wrecked vessel."

It would seem, therefore, that a case which was decided prior to the Act, holding an owner liable would be a recognition of the common law liability, as distinct from the statutory liability. In the case of *The Fred Schlesinger*, 71 Fed. 747 (N. D. N. Y. 1896), the Court held that the owners of a yacht, which had been sunken in eighteen feet of water

in a frequented channel, could not recover from a vessel colliding with the wreck for damage to the wreck hull on the grounds that the owners of the wreck were negligent in failing to indicate by sufficient signals the location of the wreck. Coxe, D. J., on page 748, said:

> "* * * Such a wreck directly in the track of passing vessels is a most dangerous menace to navigation. Regard for her own safety, as well as for the safety of others, should compel those responsible for her to make her presence known by plain and unmistakable signals. * * *"

The case of *The H. S. Nichols*, 53 Fed. 665, (1893) Southern District of New York, by Brown D. J., recognizes this principle.

The American courts all cite with approval and as authorities the leading English cases, dealing with this question, as do also our text books, 29 Cyc. 310.

There seems to be no English statute similar to ours. The Merchant Shipping Act of 1894, Section 530, which is apparently a re-enactment in part of the Removal of Wrecks Act, 1877 (40 and 41 Vict. C. 16, S. 4), provides that where any vessel is sunk, stranded or abandoned in any harbor or tidal water under the control of a harbor authority, in such manner as in the opinion of the authority may become a danger to navigation, that authority may light or buoy any such vessel or part until the raising, removal or destruction thereof. It would, therefore, seem that except insofar as this statute may apply, the law of England as laid down in the cases is the common law, and it is apparently well established and, in fact, does not seem to be disputed, that where the management and control of a wreck, so far as

relates to the protection of other vessels, has not been legitimately transferred by the owners, either they or the *res* are liable for a collision which occurs through insufficient lighting, buoying or other protection.

Brown vs. *Mallett* (1848) 5 C. B. 599;
White vs. *Crisp* (1854) 10 Exch. 312;
The Douglas (1882) 7 Prob. D. 151, C. A.;
The Utopia [1893] A. C. 492 P. C.;
The Snark [1900] Prob. D. 105, C. A.

These cases all recognize the principle to be well established and undisputed law that where the owner, who has not abandoned or transferred possession, is negligent in marking the wreck, he is liable in regard to the protection of other vessels. The law is stated by Lord Halsbury in Vol. 26 of The Laws of England, Shipping, Paragraph 533, as follows:

> "The owner of a ship sunk, whether by his default or not, if he abandon possession and control of her, has not any responsibility to light her so as to protect other vessels from a collision with her; but so long and so far as possession, management and control of the wreck be not abandoned or properly transferred, he is bound to take proper steps as regards lighting. In order to fix the owner with liability, it must be shown that, as regards lighting, the control of the vessel had not been abandoned or legitimately transferred, and that the owner has been negligent in the discharge of his legal duty."

In the case of *The Snark* [1900], Prob. D. 105, C. A., an owner who had hired a contractor to raise his sunken barge in the River Thames was held personally liable in damages

to a steamship which collided with the sunken barge on the grounds that the owner had not abandoned the wreck and was, therefore, liable for negligence whether it was the negligence of himself in not placing lights, or of someone whom he had hired to salvage the wreck. The court, by A. L. Smith, L. J., refers to *The Utopia* with approval, saying, at page 111—

> "* * * It is there in effect laid down that although it is in the power of the owner to abandon his sunken barge, and having nothing more to do with it, until he has done that he is under the ordinary liability of every other man. * * *"

The principle laid down in *The Utopia,* to which the court is referring here, is, in the words of the court, at page 498 of [1893] A. C.:

> "The result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her. It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shown, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they

have in the discharge of their legal duty been guilty of wilful misconduct or neglect."

The American cases are to the same effect both before and after the Act of 1899:

The Mary S. Lewis, 126 Fed. 848.
The Anna M. Fahy, 153 Fed. 866.
The Macy, 170 Fed. 930.
The Drill Boat No. 4, 233 Fed. 589.
The Fred Schlesinger, 71 Fed. 747.
The H. S. Nichols, 53 Fed. 665.

The Peoples Coal Co. v. *The Second Pool Coal Co.*, 181 Fed. 609 (D. C. Penn.), affirmed 188 Fed. 892. Orr, Judge, page 611, said:

"* * * Prior to the act of Congress, it was the duty of the owner of a sunken craft to put a buoy or light on it until it was abandoned. * * *"

Therefore the *Snug Harbor*, or her owner, if privately owned, would have been liable at common law for the libelant's loss in the absence of proof of abandonment.

II. THE COMMON-LAW LIABILITY ABOVE MENTIONED HAS BEEN FIXED AND EMPHASIZED BY THE STATUTE OF MARCH 3, 1899, AND THE DECISIONS THEREUNDER.

This statute is the Act of March 3, 1899, c. 425, Sec. 15 (Sec. 9920 of U. S. Comp. Stat. 1916), 30 Stat. L. 1152, c. 425, the pertinent portion of which reads as follows (italics ours):

"* * * And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, acci-

dentally or otherwise, *it shall be the duty* of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and the failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for."

Sec. 19 of this same act provides for a period of 30 days before an abandonment is complete, unless legally established in a less space of time, and further provides that the Secretary of War may arrange for an earlier abandonment by publication of a notice for not less than 30 days, published in a newspaper near the locality of the wreck.

The full text of the Act of March 3, 1899, is annexed hereto as Appendix IV.

The leading cases holding that there is a duty to mark a wreck under this statute are as follows:

The Anna M. Fahy (1907) 153 Fed. 866, C. C. A. 2nd C.

The Macy (1909) 170 Fed. 930, C. C. A. 2nd C.

People's Coal Co. v. *Second Pool Coal Co.* (D. C. 1911) 181 Fed. 609. Affirmed 188 Fed. 892, C. C. A. 3rd C. Writ of certiorari denied 223 U. S. 727.

In 1915 the Circuit Court of Appeals for the 2nd Circuit reversed Judge Mayer in *The Plymouth* (District Court), 220 Fed. 348; (C. C. A.) 225 Fed. 483, and held that the owner of a vessel sunk in the Hudson River had complied with the section of the statute requiring it to mark the wreck by obtaining the services of the Lighthouse Department, which had official authority to do the same. (Res. March 2, 1868, Sec. 1—Sec. 8452, U. S. Comp. Stat, 15 Stat. 249.)

This reversal by the Circuit Court of Appeals for the 2nd Circuit was based on *The Douglas,* 7 Prob. 151 (1882). In *The Douglas* case it was held by the Court of Appeals that the common law liability of the owner to buoy a wreck was met by requesting the Harbor Master to care for the wreck. The Harbor Master promised to buoy the wreck but delayed, and a collision resulted. The owner of the wreck was held in no way responsible for the accident.

The Chambers (D. C. S. D. N. Y. 1924) 298 Fed. 194. The facts in this case do not make it clear precisely where the vessel was lost, but it was apparently in the neighborhood of South Amboy. A spar was painted red and sunk on the wreck with iron weights, but it carried away and therefore the wreck was not buoyed. It was held by Learned Hand, D. J., that the statute (Comp. Stat. Sec. 9920) imposed a continuous duty and that the owner must get frequent reports whether or not the buoy had carried away, and that he must show what prevented him, when it carried away, from substituting a new one. The statute, said Judge Learned Hand, is "drastic"; he held that the burden was on the owner to show why he did not watch the buoy.

"Either he must have done more, or have abandoned his rights, which would have cleared him." P. 195.*

III. THERE IS NO PRESUMPTION OF ABANDONMENT.

Abandonment cannot be presumed and there is no governmental duty until after the lapse of thirty days. The loss occurred twenty-nine days after the *Snug Harbor* was sunk.

In the *People's Coal Co.* v. *Second Pool Coal Co.*, 181 Fed. 609, affirmed 188 Fed. 892, certiorari denied 223 U. S. 727, Judge Orr held that failure to mark a sunken wreck is not a *prima facie* abandonment, and failure to remove does not amount to an abandonment until thirty days have elapsed or the Secretary of War has established a legal

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* A case almost exactly similar to the present one has already been decided against the United States Government.

The United States Navy scow No. 58 sank alongside of a berth in the Wallabout Channel at the Brooklyn Navy Yard. In lieu of a buoy a coffee can was moored at the outboard edge of the scow, but in spite of this the tug *E. M. Millard* collided with the wreck and sank.

Since the scow was a public vessel a special Act of Congress was necessary to permit suit to be brought, and this was obtained. 41 Stat. 1553, Chap. 144.

The litigation is reported as *The E. M. Millard* (D. C., E. D., N. Y., December 22, 1922), 285 Fed. 94. The decision precisely supports the contention here made, for recovery was granted under the Wreck Act of March 3, 1899, Sec. 15, Judge Garvin holding that the coffee can was an insufficient buoy.

It is a mute but eloquent fact that the Government, which appeals all but the clearest cases, did not appeal this case.

abandonment as provided by law. He discusses this question as follows, at pages 611-612:

> "* * * In this case abandonment is emphasized by the following quotation from Shearman & Redfield on the Law of Negligence, Sec. 583:
>
> " 'If, however, instead of abandoning such wreck, he retains such possession and control of it as it is susceptible of, he is bound to exercise an ordinary and reasonable degree of diligence in removing it or preventing it doing injury to others.'
>
> "It was urged on behalf of respondent that, because respondent had neglected its duty to mark the place of the sunken vessel and to immediately commence the removal of the same from the river's channel, that of itself constituted an abandonment, and therefore there is no responsibility. To hold this would permit the respondent to take advantage of its own wrong. The neglect to mark the sunken craft was no prima facie abandonment, and failure to remove was not abandonment until a period of 30 days had elapsed, or the Secretary of War had established the legal abandonment of the vessel within the statutory period. There is no evidence in this case that the Secretary of War had taken any steps to declare the abandonment of the vessel within 30 days, and therefore the respondent had all of 30 days to remove same before the sunken craft could be considered as having been abandoned. This seems to me to be a reasonable construction of the language of the act. * * *"

In *The Mary S. Lewis*, 126 Fed. 848, the Court said at page 849:

> "* * * Growing out of, and in connection with, these questions, is one vital, essential, and controlling

> inquiry, which, when answered, practically disposes of the serious contention, and this is the question: In the circumstances, was the place of the wreck properly marked or designated by warning buoys, beacons, or by any other means, so that mariners in the harbor should have been put on guard, and have had reason for avoiding the dangerous spot?"

The Circuit Court of Appeals for the Second Circuit said in *The Macy,* 170 Fed. 930:

> "This statute was before us in The Anna M. Fahy, 153 Fed. 866, where it was held that the duty of marking the location of the wreck was placed by the statute upon the owner, and no one else, and that there is no divided responsibility. It was further held that when the owner of a sunken wreck has neglected to comply with the statute, and by reason of the absence of buoy, beacon, or mark of any kind, a vessel herself free from fault has sustained damages by collision with the wreck, recovery therefor may be had against the colliding vessel. * * *"

In *The Anna M. Fahy,* 153 Fed. 866, the Circuit Court of Appeals for the Second Circuit said:

> "The libel was filed upon the theory that the Fahy was solely liable for the reason that her owner neglected to comply with the provisions of Section 15 of the Act of March 3, 1899, which directs that it shall be the duty of an owner of a vessel sunk in a navigable channel immediately to mark it with a buoy or beacon during the day and a lighted lantern at night. * * *
>
> "The duty thus made imperative was wholly neglected. From the sinking of the Fahy to the collision with the Bulley nearly ten hours elapsed

and no buoy or beacon, or mark of any kind, had appeared above the wreck. This failure to act, imperilling as it did the lives and property of those navigating a much frequented channel, is made unlawful by the statute and was negligence of a pronounced type. * * *

"* * * The law placed the duty of marking the wreck upon him and he cannot escape responsibility by delegating it to others. * * *

"The statute places the duty to mark upon the owner and no one else; there is no divided responsibility and, if the statute is to be effectual, there cannot be. * * *

"We do not intend to hold that conditions may not arise where a duty is imposed upon a tug to mark a wreck caused by her negligence. * * * [It is] where communication with [the owner] is impossible from any cause, that a duty rests upon the tug to mark the wreck. No such situation arises in the case at bar. There was nothing whatever to prevent the owner from marking the wreck; the tugs knew this and were justified in assuming the owner would act as he was commanded to act by law."

The rule is thus stated in 1 C. J., pp. 5-6:

Abandonment is "the giving up of a thing absolutely, without reference to any particular person or purpose. * * *"

Abandonment "includes both the intention to abandon and the external act by which the intention is carried into effect.

"To constitute abandonment in respect of property, there must be a concurrence of the intention to abandon and an actual relinquishment of the property, so that it may be appropriated by the next comer."

In *The Drill Boat No. 4,* 233 Fed. 589, it is said at page 594:

> "Their [the crew's] employment did not terminate when their vessel sank. 'The duty of the seamen continues on these melancholy occurrences as long as they can be useful in preserving the property at risk and gathering up its fragments.' Story, J., *The Two Catherines,* Fed. Cas. No. 14,288. See, too, *The Massasoit,* 1 Sprague, 97, Fed. Cas. 9,260. * * *"
>
> "* * * The danger of further injury to the drill boat from collision with other vessels was great; it was in fact seriously damaged by the Massachusetts. It was clearly the duty of its crew to use reasonable care and diligence to protect it against such damage, and in connection therewith to warn other vessels against colliding with it. This they failed to do, and there were not overweighing considerations —e. g., of personal safety—which justified them in disregarding those duties. I therefore hold that the petitioner was personally at fault for the unseaworthy condition of drill boat No. 4, due to its being improperly manned, and that to this fault is attributable the failure of the crew to warn the Massachusetts, by marker or otherwise, of the existence of the wreck."

In the present case the allegations of the libel must be taken as admitted both by the Government's suggestion or by the exceptions.

In the libel, by the amendment allowed at the argument, it is alleged, in Article 6,—

> "that up to the time hereinafter mentioned notice had not been given or published advising mariners navigating the waters in which the *Snug Harbor* had sunk, of the presence of the wreck."

The only two governmental acts which the United States could have performed concerning the wreck during the period of thirty days under the statute would have been (1) to have taken charge of the wreck and destroyed it in case there had been any actual abandonment of the wreck by the Shipping Board to the Government, or else (2) in the exercise of its governmental function for the safety of mariners to have given notice of the presence of the wreck and its location so that mariners navigating those waters would have understood that there was a wreck there and where they should go to avoid it.

The Government did not give any such notice and, as there cannot be any presumption of abandonment, the situation is one where the Government as owner has not made out an abandonment and there are not any facts from which an abandonment can be assumed by the exercise of any *governmental function* with regard to the wreck.

IV. THE WRECK OF *The Snug Harbor* LAY IN A FREQUENTED FAIRWAY WITHIN WATERS OVER WHICH BOTH THE DISTRICT COURTS FOR THE SOUTHERN AND THE EASTERN DISTRICTS OF NEW YORK HAVE CONCURRENT JURISDICTION.

The place of the wreck of the *Snug Harbor,* as stated in the libel, which must be taken to be admitted owing to the way in which this case comes before the Court, is as follows:

> "About 4¼ miles East by North of Montauk Light in a frequented channel way within the harbor and inland waters."

Thus, the accident happened at a place which is within the inland waters of the United States as defined by the Secretary of Commerce. These are laid down in the Navi-

gation Laws of the United States, 1923 ed., at page 288 as follows (italics ours):

> "Nantucket Sound, *Vineyard Sound,* Buzzards Bay, Narragansett Bay, Block Island Sound, and easterly entrance to Long Island Sound: A line drawn from Chatham Lighthouse, Mass., 154° (S. by E.), 6½ miles, to Pollock Rip Slue Light Vessel; thence 137° (SSE ½ E.), 11 miles, to Great Round Shoal Entrance Gas and Whistling Buoy (PS.); thence 229° (SW. by W. ⅝ W.), 14½ miles, to Sankaty Head Lighthouse; from Smith Point, Nantucket Island, 261° (W. ⅜ N.), 27 miles, to No Mans Land Gas and Whistling Buoy, 2; thence 359° (N. by E. ⅛ E.), 8⅛ miles to Gay Head Lighthouse; thence 250° (W. ⅝ S.) 34½ miles, to Block Island Southeast Lighthouse; *thence 250½° (W. ⅝ S.), 14¾ miles, to Montauk Point Lighthouse, on the easterly end of Long Island, N. Y.*"

In *The Persian* and *The Hesperides,* 181 Fed. 439, Pollock Rip Slue at the mouth of Vineyard Sound, which is referred to in the above quotation, was treated as a narrow channel in respect to anchorage, by the Circuit Court of Appeals for the Second Circuit. The principle laid down in that case is controlling in this. The syllabus is as follows:

> "A collision occurred at night in a dense fog off the Massachusetts coast a short distance to the north of the northern entrance to Pollock Rip Slue between the steamship *Persian* going northward and the steamship *Hesperides,* which had anchored on account of the fog. The fairway for deep-draft vessels navigating up and down this part of the coast lies for miles through dangerous shoals and has been charted and marked by the Government by lightships and buoys. From the Pollock Rip Shoals Lightship,

which was a half mile or more to the northward of the place of collision, the range is straight to the southward through the slue for four and one-half miles to the Pollock Rip Lightship, marked at intervals of one and one-half miles by Whistling Buoy No. 2 and Bell Buoy No. 1, and the preponderance of evidence showed that the *Hesperides* was anchored directly in this range, which vessel in a fog follow by compass between the two lightships. The *Persian* stopped on hearing the fog bell of the *Hesperides,* but on seeing a light on the starboard bow the master assumed that it was on a small vessel, starboarded the helm, and proceeded at greater speed directly toward the *Hesperides,* whose stern light was then seen on the port bow, but too late to avoid collision. Held, that the *Hesperides* was in fault for anchoring in the dense fog in the fairway, which was constantly used by other vessels when there was open sea to the east of her; that the *Persian* was also in fault for not navigating with greater caution after hearing the fog bell of the other vessel."

The wreck lay within waters over which the District Courts of the United States for the Southern and Eastern Districts of New York have concurrent jurisdiction.

The Judicial Code, Section 97, delimits the judicial districts in the State of New York and constitutes four such districts.

The provisions regarding the Southern and Eastern Districts are as follows:

> "The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month.

> The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters."

The result of this location of the wreck is that a proceeding *in rem* could have been brought against the wreck in the Southern or Eastern districts of New York if the wreck had been privately owned.

The Macy, 170 Fed. 930 (C. C. A., 2nd Cir.)
The Douglas, (1882) 7 Prob. Div. 151 (C. A.)

Furthermore, a private owner of the wreck who had allowed the wreck to go unmarked and had caused the dis aster claimed for in these libels, would not be able to invoke the limitation of liability statutes because of the fact that his failure to mark the wreck would make him privy to the accident within the meaning of the statute and preclude his claiming its exemptions. It would be a failure in a personal duty imposed on him by the law.

The Drill Boat No. 4. 233 Fed. 589.

LAST POINT.

THE APPEAL HEREIN SHOULD BE ALLOWED AND THE DECREE BELOW REVERSED WITH INSTRUCTIONS TO PROCEED WITH PLENARY TRIAL OF THE SUIT.

To summarize, this is the situation in this case:

We have a statute giving a right to sue the United States by an admiralty proceeding *in personam* with the option in the libelant, if he so elects in his libel, that

> "the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained."

And further provided elections so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit.

At the commencement of Section 3 it is further provided:

> "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

That is all that the libelants ask in this case.

If the question of jurisdiction *in rem* be regarded as important, the cases hereinbefore cited indicate (1) that the wreck is liable *in rem*, (2) that the wreck of the *Snug Harbor* was within the jurisdiction of the District Court of the United States and would be subject to be sued *in rem*

and, hence, the objection taken in the *Blamberg* case could not be taken in the present case.

It would seem, therefore, that every requisite to founding the jurisdiction in the present case exists.

We have the consent of the Government to be sued.

We have the presence of the wreck within the jurisdiction of the United States, if that be essential.

We have a situation in which a private owner would have been liable if the *Snug Harbor* had been owned by a private owner, and

We have the *Snug Harbor* used as a merchant vessel when she was sunk.

It seems, therefore, that there can be no escape from the fact that the Court below erred in dismissing the libel on jurisdictional grounds.

Respectfully submitted,

EDWARD R. BAIRD, JR.,
JOHN M. WOOLSEY,
Of Counsel.

Norfolk, Virginia, April, 1926.

APPENDIX I.

Legislative History of the Suits Against United States in Admiralty Act.

I. There are three drafts of the Suits Against the United States In Admiralty Act, the second and third drafts being almost absolutely the same, with merely the slightest of changes between them, and the third draft being the present Suits In Admiralty Act as passed by the Senate and the House of Representatives without any change whatsoever.

Essentially all these drafts are the same, and the apparent differences exist chiefly between the first and second drafts. But these differences are more apparent than real, because while sentences have been shifted around from one section to another between the first two drafts, each one has practically the same content.

For instance, Section 2 of the second draft, which is practically unchanged in its form in the present law, is composed of two sentences taken from Section 1 of the first draft and of a sentence taken from Section 7 of the first draft, together with a further sentence added to give more clarification.

Section 3 of the second draft represents a similar shifting around. The first three sentences are a condensation of matter contained in Section 1 of the original draft. The fifth and sixth sentences have been taken from Section 2 of the first draft, and the last sentence represents the entire Section 4 of the first draft.

In the same way, Section 4 of the second draft is Section 5 of the first draft almost verbatim.

Section 6 of the second draft is Section 3 of the first draft with no important verbal changes.

II. Bearing this in mind, it will, therefore, be helpful to ascertain what the purpose was behind the first draft.

III. The Act was drawn up in the summer of 1919 by Mr. Ira A. Campbell, then Special Assistant to the Attorney General and in charge of admiralty litigation. He had previously been Admiralty Counsel of the United States Shipping Board from May 1, 1918, before he became Assistant to the Attorney General. As a result of his practical experience in these positions he drafted H. R. 7124.

At the Hearing Before the Committee on the Judiciary, House of Representatives, Sixty-sixth Congress, First Session, held August 26, 1919, he testified, according to the official report, as follows:

> Pages 11-12. "Mr. Campbell. I will now read the bill, H. R. 7124:
>
> 'A BILL authorizing suits against the United States in admiralty, for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States, and any corporation in which the United States owns not less than a majority of the capital stock,

may be sued in personam in the district courts of the United States in admiralty for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions——'

"Mr. Steele. What was your idea in using the word 'ordinarily' within the jurisdiction? Would it not be clearer if you left the word 'ordinarily' out?

Mr. Campbell. I will tell you why I used it. What I am trying to do is to place the Government in the same position in suits in the admiralty courts as the private owner is. I put that word in there to try to express and convey that particular intention. * * *

I will continue reading:

'arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States or such corporation of any merchant vessel, or the possession, carriage, or ownership by the United States or such corporation of any cargo in those cases where, if the United States were suable as private party, a suit in personam could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit.'

In brief, that means the United States could be sued in personam in any case arising out of the carriage, etc., of cargoes by Shipping Board vessels, where a private citizen could be sued."

IV. Section 1, therefore, specifically says that a pure suit *in personam* can be maintained: "The United States * * * may be sued *in personam* * * * in those cases

where, if the United States were suable as a private party, a suit *in personam* could be maintained * * *."

This was the intention of the draftsman and the clear understanding of the Committee on the Judiciary, as shown by the following statements from the official report:

> Page 14. "Mr. Webb. Does this section take away the right of bringing an action in rem?
>
> Mr. Campbell. No, sir; in the next section I cover that. This first section gives the right of action in to personam.
>
> Mr. Webb. That is the only change in existing law that this section makes?
>
> Mr. Campbell. I could not say absolutely that there is no change in existing law, because the only law we have on the subject to-day is that grounded upon Section 9 of the Shipping Board Act, as interpreted from the Supreme Court decision in the *Lake Monroe* case. That says nothing about liability with respect to ownership and carriage of cargoes and the like of that. This does. But the situation is simply this, that the Government has been and is now engaged in commercial pursuits with vessels. It is carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

V. Section 1 having covered suits purely *in personam*, Section 2 was intended to cover suits nominally *in personam* but proceeding according to the principles of suits *in rem*. This again appears clearly from the testimony at the official hearing:

Page 16. " 'Sec. 2. That no suit in rem shall be brought against nor any warrant of arrest or attachment levied upon any vessel owned or operated by or demised to or in the possession of the United States or such aforesaid corporation, nor against nor upon any cargo owned or/and in the possession of the United States or such corporation, but any suit brought hereunder shall, if the libelant so elects in his libel, proceed in accordance with the principles of suits in rem in all cases wherein maritime liens exist and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a libel [suit] in rem could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit; but election to proceed as aforesaid as in rem shall not preclude the libelant in a proper case from also seeking relief in personam in the same suit.'

Mr. Webb. You read 'suit' in line 15.

Mr. Campbell. 'Libel' should be changed to 'suit'. That is a slip on my part. Use the word 'suit' throughout.

Let me explain that section. It first provides that no suit in rem shall be brought nor any vessel of the United States, and that any cargo owned and in possession of the United States, shall not be libeled or attached, but any suit brought under this bill, and that is a suit authorized by the first section, suits in personam—

'shall, if the libelant so elects, proceed in accordance with the principles of suits in rem, in all cases where maritime liens exist, and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a suit in rem could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit.'

That it contemplates meeting this situation. There are cases where a libelant acquires a different right in rem than in personam. I think I can state the law, if my friends will correct me. I believe the law is that if a vessel is in collision while her navigation is under the control of a compulsory pilot, she is liable in rem, but that you could not hold the owner liable for an action in personam. Now, there may be cases, I can not state them to you at the moment, where a different ranking of liens may be given in actions in rem than in actions in personam."

VI. As a corollary of the liability intended to be imposed upon the United States according to this draft, both *in personam* and *in rem*, which liability was intended to be co-extensive with that of any private owner, the United States was then granted the benefits of all limitations of liability accorded by law to private persons.

Page 17. "Mr. Campbell. * * * I will read Section 3.

'Sec. 3. That the United States and such aforesaid corporation shall be entitled to the benefits of all exemption from and all limitations of liability accorded by the statutes of the United States and of the several States and Territories and by the maritime law to the owners, charterers, operators, and agents of vessels.'

In other words, I confer expressly upon the Government all the rights which private owners have with respect to the limitation of their liabilities, the plan being, or the attempt being, to place the Government in the same position as a private owner."

VII. The purpose of the draftsman was to cover all causes of action cognizable in admiralty. (Italics ours.)

> Page 46. "Mr. Webb. Mr. Campbell, what is the result in this bill of the United States being sued directly?
>
> Mr. Campbell. What is the result?
>
> Mr. Webb. Yes; in what cases would suit be brought against the United States, by name, instead of the corporation?
>
> Mr. Campbell. *In all cases of tort and contract arising out of possession, ownership, or operation of* any ship, *any merchant vessel,* as the bill now reads, possession or ownership.
>
> Mr. Webb. You would sue the United States?
>
> Mr. Campbell. Yes, sir."

In a word, as Mr. Campbell said, and substantially this statement was repeated again and again by the proponents of the bill on the floor of Congress:

> Page 14. "* * * the Government has been and is now engaged in commercial pursuits with vessels. It is carrying cargoes for everyone who applies, and there is no reason why the Government, in the operation of this commercial fleet in commercial trades, should not be subject to the same liabilities as the private owner who engages in that business."

For the convenience of the Court we have set forth hereinafter all the relevant extracts from the Congressional Record which, in our opinion, throw light upon the passage of the bill and serve to show what the real intent of Congress was. We have also given as Appendix II the first seven sections of the first draft and the first six sections of

the second draft, which contain all the provisions which throw any light upon the question of pure suits *in personam.*

The conference report on the bill S. 3076, which is referred to in the extract from the Congressional Record of February 28, 1920, is not given, because the report of the conference contains nothing except the third draft of the Act, which was passed by the Senate and the House of Representatives without alteration, and which is, therefore, exactly the same as the first six sections of the present Act, which we have printed in full as Appendix III.

The principal debate upon the bill was held in the House of Representatives, where the bill was sponsored by Mr. Volstead and supported by Mr. Husted and Mr. Walsh.

On January 17, 1920, Mr. Volstead, in introducing the bill, spoke as follows (Congressional Record, Vol. 59, Part 2, page 1680):

> "Sec. 9 of the Shipping Act made the Government of the United States liable for marine torts. Simple justice required that if the Government entered upon the business of carrying freight we ought to make the Government stand in practically the position of a private individual as to liability, so that those who might be injured by its operation could have a remedy. Under the old law the Government could not be sued. * * *"

It was recognized in Congress that the Act by its broad terms went well beyond the provisions of Section 9 of the Shipping Act of 1916 and also well beyond the doctrine of the *"Lake Monroe"*, 250 U. S. 246.

Pages 1685-1686. January 17, 1920:

"Mr. Oliver. If the gentleman's amendment is adopted by the House it will give a right of action in many cases against the Government where that right does not now exist?

Mr. Husted. Oh, yes; in very many cases.

Mr. Oliver. I wish to call attention to that, because in replying to the question propounded by the gentleman from Illinois (Mr. Madden), the gentleman's answer did not convey that idea. This bill carries forward the right to sue the Government much further than the *Lake Monroe* case does.

Mr. Husted. Oh, very much. The *Lake Monroe* case was solely confined to merchant vessels and the merchant service.

Mr. Whaley. And under charter.

Mr. Husted. And under charter.

Mr. Whaley. They had to be under charter. If they were in ballast the action would not lie.

Mr. Husted. My amendment creates a right of action against the vessels of the United States under these four important limitations.

Mr. Oliver. In other words, it gives a right of action against the Government for any act of negligence in the performance of a governmental function.

Mr. Husted. Not any act of negligence, but any act of negligence in the operation of vessels upon the high seas.

Mr. Oliver. Yes.

Mr. Husted. Or upon inland waters, where they meet on equal terms citizens of the United States engaged in private shipping."

By both Mr. Volstead, Mr. Husted and Mr. Walsh it was stated that the reason for passing the Act was that where the Government managed and operated vessels which it

controlled, as a business enterprise, it ought to go upon the same footing as a private individual and a private corporation, and since the Government was in competition with privately owned vessels, it ought to be put upon the same footing with them.

"Mr. Husted. My amendment is based in reason upon the common justice of granting relief to the citizens of the United States who have been injured through the negligence or incompetent operation of public vessels of the Government of the United States.

I do not think I can do better, in the discussion of the question of the moral responsibility of the Government in these cases, than to quote from a very able brief of Senator Hoar, of Massachusetts, who was chairman of a committee that investigated this question. This report of Senator Hoar has been commented upon favorably in a number of cases in the Court of Claims.

"'The Committee think that the Government of the United States is not liable for loss or damage occasioned to private citizens by reason of any imperfection in the performance of the ordinary functions of government or by reason of the acts, omissions, or negligence of its officers or agents in the discharge of such functions. * * *

"'But we are of the opinion that there are two classes of cases where sound public policy requires the United States and all other sovereign Governments to hold themselves responsible for injuries occasioned by the negligence of their agents. One is where the Government, through its agents, manages or controls property from which it receives a benefit or profit. * * *

"'Another class of cases where this responsi-

bility is recognized is where the Government is using or managing property through its agents under circumstances where these agents mingle on terms of equality with the general mass of citizens, and where the security of the citizens requires that the same obligation shall rest upon them, and that it shall be enforced by similar responsibility, as in the case of private persons.' "

Page 1687. "Mr. Walsh [*in supporting the bill*].—* * * with respect to merchant ships we have said in the shipping act, and we say by this bill, that the Government is operating vessels which it owns or controls as a business enterprise, and when the Government goes into that business enterprise it ought to go upon the same footing as a private individual or a private corporation, and it ought to be subject to the same liabilities for any act of Government officials in carrying out that particular business enterprise. In carrying on the operation of these ships we are operating them in commerce, in competition with privately owned vessels and ships, and we ought to be put upon the same footing as those others; * * *."

At no spot in the hearings nor in the committee or conference reports, nor in the Congressional Record, is it suggested that the Act is intended to include only causes of action which are purely *in rem.*

Likewise at no spot in the entire legislative history of this bill was it ever suggested that the Act was intended to exclude causes of action which were purely *in personam.*

On the contrary it appears both in the hearings and in the debates in Congress that it was the intention of Congress to impose upon the Government a new liability exactly the same as that of any private shipowner. This was plainly expressed in the original draft of the Act, and the subsequent drafts depart from the first draft only by attaining greater conciseness.

For instance, where the first draft says that the United States may be sued *in personam* "in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit," the final form briefly says "that in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, * * * a libel in personam may be brought against the United States."

This greater generality cannot fairly be said to be narrower than the earlier specific enumeration.

Nevertheless this idea of actions *in personam* as well as actions *in rem* persists all through the Act, although it was made more general at that spot. For instance, at the end of Section 2 as it exists at present, it is provided that the United States may file "a libel in rem or in personam in any district" and that thereupon "a cross libel in personam may be filed" against the United States.

It has been mentioned above that Section 5 of the first draft is in all material respects the same as Section 4 of the present Act.

Section 5 originally read: (our italics) "that in the event of any privately owned vessel, out of the possession of the United States, being arrested in any suit *in rem* or attached in any suit *in personam*", etc. As the words "arrest" and "attach" have a technical meaning in admiralty procedure, this passage was condensed and reads in the present law: "that if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached", etc. The present form still preserves by this antithesis the original contrast of an action *in personam* or *in rem*.

In the same way the provision which is today found in Section 3, namely "If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed, a libel in rem might have been maintained," was taken quite exactly from Section 2 of the first draft, which read as follows:

> "Any suit brought hereunder shall, if the libelant so elects in his libel, proceed in accordance with the principles of suits in rem in all cases where maritime liens exist and where, if the vessel or cargo with respect of which the action arises were privately owned and possessed, a libel [suit] in rem could be maintained * * *."

If suits can be brought against the Government only in accordance with the principles of suits *in rem*, this provision for an election of the libleant becomes quite meaningless.

It can have a meaning only if the libelant may proceed purely *in personam.*

We submit that the entire history of the Act as well as its literal wording shows that it was intended that a libelant could bring a pure *in personam* suit in admiralty against the United States.

APPENDIX II.

From The Congressional Record, Vol. 59, Part 2, pp. 1678-1679. Jan. 17, 1920.

Suits Against the United States for Maritime Torts.

Mr. Volstead. Mr. Speaker, I move that the House resolve itself into Committee of the Whole House on the state of the Union for the consideration of the bill (S. 3076) authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes. * * *

The Clerk read the bill, as follows:

"Be it enacted, etc. That the United States, and any corporation in which the United States owns not less than a majority of the capital stock, may be sued in personam in the district courts of the United States, in admiralty, for any cause of action of which said courts ordinarily have cognizance in their admiralty and maritime jurisdictions, arising since April 6, 1917, out of or in connection with the possession, operation, or ownership by the United States, or such corporation, of any merchant vessel, or the possession, carriage, or ownership by the United States, or such corporation, of any cargo, in those cases where, if the United States were suable as a private party, a suit in personam could be maintained, or where, if the vessel or cargo were pri-

vately owned or possessed, a suit in rem could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of suit. Any such suit shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises, or in any district in which the Attorney General or other duly authorized law officer may agree to appear. In case the United State, or such corporation, shall file a libel in rem, or in personam, in any district, a cross libel in personam may be filed, or a set off claimed against the United States, or such corporation, with the same force and effect as if the libel had been filed by a private party. Such district court is hereby authorized to hear and determine any such suit upon the principles of liability and in accordance with the practice obtaining in like cases between private parties in suits in admiralty, and, in a proper case, to enter a decree for or against the United States, or such corporation, with costs, and if for a money judgment, together with interest at the rate of 4 per cent per annum until paid, unless the suit involves a contract stipulating a higher rate of interest, in which event interest shall be allowed in accordance with the contract, and all interest shall run as ordered by the court. Appeal from the decree of the district court in any case brought under this act shall lie to the circuit court of appeals and to the Supreme Court, and the decision of the circuit court of appeals shall be reviewable by the Supreme Court, as now provided in other cases of admiralty and maritime jurisdiction.

Sec. 2. That no suit in rem shall be brought against, nor any warrant of arrest or attachment levied upon, any vessel owned or operated by, or demised to, or in the possession of the United States, or such aforesaid corporation, nor against nor upon any cargo owned and in the possession of the United States, or of such corporation, but any suit brought hereunder shall, if the libelant so elects in his libel, proceed in accordance with the principles of suits in rem in all cases wherein maritime liens exist and where, if the vessel or cargo with respect to which the action arises were privately owned and possessed, a suit in rem could be maintained and the vessel or cargo arrested or attached at the time of the commencement of suit; but election to proceed as aforesaid as in rem shall not preclude the libelant in a proper case from also seeking relief in personam in the same suit.

Sec. 3. That the United States and such aforesaid corporation shall be entitled to the benefits of all exemptions from, and all limitations of, liability accorded by the statutes of the United States and of the several States and Territories, and by the maritime law, to the owners, charterers, operators and agents of vessels.

Sec. 4. That neither the United States nor such aforesaid corporation shall be required to give any bond or admiralty stipulation in any suit brought hereunder, either in the court of original jurisdiction or in any appellate court.

Sec. 5. That in the event of any privately owned vessel out of the possession of the United States being arrested in any suit in rem or attached in any suit in personam, such vessel shall be immediately released without bond or stipulation being required

therefor upon the United States, through the Attorney General, or any other officer duly authorized by him intervening and assuming responsibility for all liability arising in such suit, and upon such intervention said cause shall proceed against the United States in accordance with the provisions of section 2.

Sec. 6. That jurisdiction be, and hereby is, conferred upon the several courts of the United States for the purposes herein specified.

Sec. 7. That in any suit brought hereunder, the libelant shall file his libel, duly verified, with the clerk of the district court having jurisdiction of the cause, and shall forthwith serve a copy thereof on the United States attorney for such district, and mail a copy thereof, by registered mail, to the Attorney General of the United States, and shall file with the clerk of said district court an affidavit of such service and mailing. Such service and mailing shall constitute a valid service on the United States. • • •

The following committee amendment was read:

Strike out all after the enacting clause and insert the following:

'That every vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation, or operated by or for the United States or such corporation, is hereby declared to be a public vessel of the United States and to be immune from arrest or seizure. Any cargo owned and possessed by the United States or by such corporation is hereby declared to be public property of the United States and to be immune from arrest or seizure.

'Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained, a libel in personam may be brought against the United States or against any such corporation, as the case may be, provided that such vessel is employed or intended to be employed in the carriage of cargoes or of passengers for hire. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party: PROVIDED, That upon application of either party the cause may, in its discretion, be transferred to any other district court of the United States, or to any such court upon which they may agree.

'Sec. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree

against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per cent per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

'Sec. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen out of the previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the

United States in accordance with the provisions of this act.

'Sec. 5. That suits as herein authorized may be brought on causes of action arising since June 6, 1917 provided that suits based on causes of action arising prior to the approval of this act shall be brought within one year after the approval of this act; and all other suits hereunder shall be brought within two years after the cause of action arises.

'Sec. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.' ''

From the Congressional Record, Vol. 59, Part 4, page 3629, February 28, 1920.

Suits Against the United States in Admiralty (S. Doc. No. 233)—Conference Report.

Mr. Volstead. Mr. Speaker, I call up the conference report upon the bill (S. 3076), authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes, and I ask unanimous consent that the statement be read in lieu of the report.

The Speaker. The gentleman from Minnesota calls up the conference report on the bill S. 3076 and asks unanimous consent that the statement be read in lieu of the report. Is there objection?

Mr. Gard. Reserving the right to object, has there been a full agreement in this matter?

Mr. Volstead. Yes; there is a full agreement *and it is substantially as it was passed by the House*, with some slight changes. [Italics ours.]

The Speaker. Is there objection?

There was no objection.

The Clerk read the statement of conferees.

[The Conference report presented the *third* draft, which was passed without change and is the present Act, given in Appendix III. The Act, therefore, is substantially the same as the *second* draft.]

APPENDIX III.

Suits Against the United States in Admiralty, Etc.

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company (Sec. 1).

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall

constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States (Sec. 2).

Such suits shall proceed and shall be heard and determined according to principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall

become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act (Sec. 3).

If a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act (Sec. 4).

Suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises (Sec. 5).

The United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels (Sec. 6).

Act of March 9, 1920, ch. 95, 41 Stat. L. 525.

APPENDIX IV.

Act of March 3, 1899; 30 Stat. L. 1152.

Sec. 15. (Obstruction of navigation by anchored or sunken vessels, floating logs, etc.—sunken vessels to be marked and removed.) That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as hereinafter provided for.

Sec. 16. (Penalties for violation of Act.) That every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five

hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. And any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat or vessel loaded with any material specified in section thirteen of this Act to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section fourteen of this Act, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section fifteen of this Act, shall be deemed guilty of a violation of this Act, and shall upon conviction be punished as hereinbefore provided in this section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections thirteen, fourteen, and fifteen of this Act shall be liable for the pecuniary penalties specified in this section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof (30 Stat. L. 1153).

SEC. 17. (PROCEEDINGS FOR VIOLATIONS OF ACT.)

That the Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of sections nine to sixteen, inclusive, of this Act; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney-General of the United States the action taken by him against offenders so reported and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney-General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers, shall have power and authority to swear out process and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this Act, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under the provisions of this Act, the person so arrested shall be brought forthwith before a commissioner, judge or court of the United States for examination of the offenses alleged against him; and

such commissioner, judge or court shall proceed in respect thereto as authorized by law in case of crimes against the United States (30 Stat. L. 1153).

SEC. 19. (REMOVAL OF SUNKEN VESSELS, ETC.—ADVERTISEMENT, PROPOSALS, AND CONTRACT—PROCEEDS.) That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: *Provided,* That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "to whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also,* That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft,

raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such work, or from any contractor for the removal of the wrecks, under this paragraph shall be covered into the Treasury of the United States (30 Stat. L. 1154).

SEC. 20. (REMOVAL OF SUNKEN OR GROUNDED VESSELS, ETC., IN EMERGENCY CASES—EXPENSES—SALE—PROCEEDS.) That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such maner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And pro-*

vided further, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

Such sum of money as may be necessary to execute this section and the preceding section of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of War.

That all laws or parts of laws inconsistent with the foregoing sections nine to twenty inclusive, of this Act are hereby repealed: *Provided,* That no action begun or right of action accrued prior to the passage of this Act shall be affected by this repeal: *Provided further,* That nothing contained in the said foregoing sections shall be construed as repealing, modifying, or in any manner affecting the provisions of an Act of Congress approved June twenty-ninth, eighteen hundred and eighty-eight, entitled "An Act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offenses," as amended by section three of the river and harbor Act of August eighteenth, eighteen hundred and ninety-four. (30 Stat. L. 1154, as amended by 31 Stat. L. 32, 32 Stat. L. 375.)

APPENDIX V.

Admiralty Rules of Practice.

Process on Filing Libel.

1.

No mesne process shall issue from the district court in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall have been filed in the clerk's office from which such process is to issue. All process shall be served by the marshal or by his deputy, or, where he or they are interested, by some discreet and disinterested person appointed by the court.

2.

Suits in Personam—Process in—Arrest in Same.

In suits *in personam* the mesne process shall be by a simple monition in the nature of a summons to appear and answer to the suit, or by a simple warrant of arrest of the person of the respondent in the nature of a capias, as the libellant may, in his libel or information pray for or elect; in either case with a clause therein to attach his goods and chattels, or credits and effects in the hands of the garnishees named in the libel to the amount sued for, if said respondent shall not be found within the District. But no warrant of arrest of the person of the respondent shall issue unless by special order of the court, on proof of the propriety thereof by affidavit or otherwise.

3.

BAIL—IMPRISONMENT FOR DEBT.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made on similar or analogous process issuing from the State court.

And imprisonment for debt, on process issuing out of the admiralty court, is abolished, in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been, or shall be hereafter, abolished, on similar or analogous process issuing from a State court.

4.

BAIL IN SUITS IN PERSONAM.

The marshal shall take from the party arrested, as bail, either sufficient cash or a bond or stipulation in a sufficient sum, with sufficient sureties or an approved corporate surety, to be held by him to secure the appearance of the party so arrested in the suit. And upon such bond or stipulation summary process of execution shall be issued against the principal and sureties or corporate surety by the court to which the process is returnable.

5.

BOND IN ATTACHMENT SUITS IN PERSONAM.

In all suits *in personam*, where goods and chattels, or credits and effects, are attached under a process authorizing the same, the attachment shall be dissolved by order of the court to which the process is returnable, on the giving of a bond or stipulation, with sufficient sureties, or an approved corporate surety, by the respondent whose property is so attached, or by someone on his behalf, conditioned to abide by all orders, interlocutory or final, of the court, and to pay the amount awarded by the final decree of the court to which the process is returnable, or in any appellate court, not exceeding, however, the value of the goods so attached with interest at six per centum per annum and costs; and upon such bond or stipulation, summary process of execution shall be issued against the principal and sureties or surety by the court to which the process is returnable, to enforce the final decree so rendered or on appeal by any appellate court.

6.

BONDS—STIPULATION—HOW GIVEN.

All bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before the clerk or a deputy clerk or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or before any commissioner of the United States authorized by law to take bail and affidavits in civil cases, or otherwise by written agreement of the parties or their proctors of record.

7.

BONDS—PREMIUMS—TAXABLE AS COSTS.

If costs shall be awarded by the Court to either or any party then the reasonable premium or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party.

8.

REDUCTION OF BAIL, BOND OR STIPULATION—NEW SURETIES.

In all suits either *in rem* or *in personam*, where bail is given or a bond or stipulation is taken, the court may, on motion, for due cause shown, reduce the amount of such bail or may reduce the amount of security given by either bond or stipulation; and in all cases, either *in rem* or *in personam*, where a bond or stipulation is given, if either of the sureties or the corporate surety shall be or become insufficient or the security for costs shall for any reason be insufficient pending the suit, new or additional security may be required by order of the court on motion.

9.

MONITION TO THIRD PARTIES IN SUITS IN REM.

In all suits *in rem* against a ship, and/or her appurtenances if her appurtenances or any of them are in the possession or custody of any third person, the court shall, on due notice to such third person and after hearing, decree

that the same be delivered into the custody of the marshal or other proper officer, if on hearing it appears that the same is required by law and justice.

* * * * * *

13.

SEAMEN'S WAGES—MATERIAL-MEN—REMEDIES.

In all suits for mariners' wages or by material-men for supplies or repairs or other necessaries, the libellant may proceed *in rem* against the ship and freight and/or *in personam* against any party liable.

14.

PILOTAGE—COLLISION—REMEDIES.

In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner.

15.

ASSAULT OR BEATING—REMEDIES.

In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

16.

Maritime Hypothecation—Remedies.

In all suits founded upon a mere maritime hypothecation of ship or freight, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of maritime interest, the libellant may proceed *in rem* and/or *in personam* against the master and/or the owners.

17.

Bottomry Bonds—Remedies.

In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosesoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has, by its own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer.

18.

Salvage—Remedies.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, and/or *in personam* against any party liable for the salvage service.

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 57

EASTERN TRANSPORTATION COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES

OPINION OF THE COURT BELOW

The District Court first filed an opinion denying the Government's motion to dismiss the libel filed under authority of the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), for lack of jurisdiction (R. 6–8), which is reported in 283 Fed. 1015. It reserved for further consideration the question whether, as the *Snug Harbor* at the time the cause of action arose was a total loss and no suit *in rem* could have been maintained, a libel based upon *in personam* liabilities would lie against the United

States under authority of that Act. Later the court reheard and reconsidered the motion to dismiss and filed an order denying jurisdiction and dismissed the libel (R. 9). The order reads:

> It appearing from the libel filed herein that prior to the time of the injury complained of in said libel the steamship *Snug Harbor* had been sunk and at the time of such sinking became and was a total loss; and the Court being of the opinion that on the facts alleged in the libel it is without jurisdiction of this case, doth sustain the suggestion of want of jurisdiction * * *.

JURISDICTION

The decree to be reviewed was entered January 30, 1925. This direct appeal was taken March 20, 1925. (R. 10.) The certificate of the District Judge (R. 9) is:

> The sole issue before the Court was as to its jurisdiction as a United States District Court sitting in admiralty, and whether it had jurisdiction over the United States in said cause, and it being of opinion that it was without jurisdiction because it was alleged in the libel that before the time of the injury complained of in the said libel the S. S. *Snug Harbor* had been sunk and had then and there become and was a total loss, the suggestion of the United States was sustained and the proceedings dismissed as to the United States. The sole question decided by the court was as to its jurisdiction.

The jurisdiction of this Court is based on Section 238 of the Judicial Code as it stood prior to the Act of February 13, 1925 (c. 229, 43 Stat. 936).

THE QUESTION

The question presented is whether the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525), authorized a libel *in personam* against the United States to recover for loss of a barge by collision with the submerged wreck of a Government vessel based upon its alleged breach of duty in failing to mark and buoy such wreck, where previously the Government vessel had been sunk and then had become a total loss and the breach complained of was not that of a merchant vessel but of the Government as its former owner.

STATEMENT

Under the supposed authority of the Suits in Admiralty Act, the Eastern Transportation Company on July 26, 1921, filed its libel (R. 1) against the United States as owner of the steamship *Snug Harbor* and the Seaboard Transportation Company as owner of the tug *Covington* and the barge *Pottsville*, to recover for loss of its barge *Winstead*. On August 15, 1920, at 9.30 p. m., while the *Snug Harbor*, then owned by the Government and employed as a merchant vessel, was en route from Baltimore, Maryland, to Portland, Maine, she was in collision with the barge *Pottsville* in tow of the tug *Covington*, as a result of which the *Snug Harbor* was sunk

and *"then and there, became a total loss"* (R. 1). On September 14, 1920, about a month later, the barge *Winstead* in tow ran upon the wreck of the *Snug Harbor* and became a total loss. (R. 2.)

The libel alleges the first collision between the *Snug Harbor* and the *Covington* and *Pottsville* resulted through the negligence of both vessels, that by that collision the *Snug Harbor "was sunk, and then and there became a total loss,"* and that the wreck of the *Snug Harbor* thereafter was not marked with a buoy or beacon by day or by a lighted lantern by night and was not removed by the United States or the Seaboard Transportation Company and no published notice had been given advising mariners navigating those waters of the presence of the wreck. (R. 1–3.) Liability is rested upon the theory that the Seaboard Transportation Company and the Government were "jointly and severally responsible for the presence of the wreck of the steamship *Snug Harbor,* and because of their failure to mark, buoy or remove the same, for the damages resulting in the loss of the barge *J. H. Winstead* and her cargo." (Libel par. 10, R. 3.)

The United States appeared specially and filed its suggestion of want of jurisdiction (R. 4, 5) and moved to dismiss the libel, assigning the following reasons:

> 1. The said alleged cause of action set out in the said libel relates to an alleged failure on the part of the officers and/or agents of

the United States to perform a purely governmental function or to alleged negligence of such officers and/or agents in the performance of a purely governmental function; and gives rise to no liability on the part of the United States of America for which they are suable in the United States Court or elsewhere.

2. *The said alleged cause of action relates to an alleged failure to mark the position of a wreck and in nowise concerns a vessel employed as a merchant vessel.* (Italics ours.)

3. The purpose of the Act of Congress approved March 9th, 1920, known as the "Suits in Admiralty Act," was to prevent the arrest and detention of vessels owned and/or possessed by the United States and then employed as merchant vessels and it was only to prevent such arrest and detention and the consequent interference with the operation of such vessels that the United States consented by the said Act to be sued in respect to such vessels. They have never consented by said act, or otherwise, to be sued in respect to a wreck or any object incapable of being employed as a merchant vessel.

4. The suit *in personam* provided for and permitted by the above-mentioned "Suits in Admiralty Act" was intended by Congress to be and is only a substitute for a suit *in rem* against the vessel itself and by the terms of said Act can be brought and maintained

only in cases where if such vessel were privately owned a suit *in rem* could be maintained against her at the time of the commencement of such action and not then unless such vessel "is employed as a merchant vessel" at that time.

5. Section 15 of the Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked and sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night, has no application to the United States of America, imposes no duty upon them and creates no liability for which they are suable in this Court or elsewhere.

The libel against the Seabord Transportation Company since has been discontinued.

After hearing, the District Judge (Groner, D. J.) filed a written opinion (R. 6–8), sustaining the contention of the libelant that by virtue of the Suits in Admiralty Act, the United States had been brought within the provisions of the Act of March 3, 1899 (c. 425, 30 Stat. 1121, 1152), and had consented to be sued for any liability that occurred in consequence of its failure to comply with Section 15 of the latter Act. This Act appears at pages 76–81 of the appellant's brief and imposes a duty upon owners of vessels to mark wrecks unless their abandonment to the Government has been established. The court, however, reserved for future consideration the question whether, as the *Snug Harbor* prior

to the loss of the *Winstead* had been sunk and at the time of sinking became and was a total loss, there was jurisdiction to maintain the libel under authority of the Suits in Admiralty Act. (R. 8.) A rehearing was had and the court filed its order of judgment (R. 9), that as the *Snug Harbor* at the time of the injury to the *Winstead* was not a merchant vessel but previously had been sunk and become a total loss, the court was without jurisdiction of the case. This appeal followed.

While the libel states that the collision in which the *Snug Harbor* sank was due to the joint fault of that vessel and the tug *Covington,* it is apparent that this is not a ground for recovery against the United States. Manifestly it is too remote. The sole ground, we understand, urged in the court below for holding the United States liable was its failure to mark or remove the wreck as required by the Act of March 3, 1899. Then the *Snug Harbor* was not a merchant vessel. She had been sunk and had become a total loss thirty days previously. This suit is not brought against the United States as a substitute for an *in rem* action against the vessel. It asserts no liability of the vessel itself. It seeks to hold the United States liable for an alleged tort—an original personal tort—in failing to mark by buoy the wreck of the *Snug Harbor.* As the *Snug Harbor* was not a merchant vessel either at the time the loss happened or the libel was filed, it is clear to us that the ruling of the District Court was proper.

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SUMMARY OF ARGUMENT

I. The libel alleges that the vessel of the United States became a total loss by the first collision. She thereupon ceased to be a merchant vessel. The Suits in Admiralty Act, in its most liberal interpretation, must be read to grant relief against the United States for tort and contract losses arising out of or incident to the possession, ownership, or operation of merchant vessels only. As at the time of the loss of the barge *Winstead,* the *Snug Harbor* was not a merchant vessel—the basis of the claim is failure of the Government to mark the wreck—the Suits in Admiralty Act does not provide relief. The claim is a tort for which the Government has not consented to be sued.

II. If the Suits in Admiralty Act is to be read only to permit a proceeding against the United States in lieu of a libel against its merchant vessels to enforce a liability against the vessel, it must be conceded the Act does not provide relief. Relief thus is limited to instances where the vessel, if privately owned, could have been proceeded against *in rem,* and the vessel at the time of the loss and at the time the libel is filed is employed as a merchant vessel. The liability asserted in the libel is failure of owners to mark the wreck. This is not the liability of the vessel or even of the wreck of the vessel, but a liability of the officers or representatives of the United States for failure to perform an alleged duty. This suit was not authorized by the Suits in Admiralty Act.

THE STATUTES INVOLVED

The Suits in Admiralty Act (Act of March 9, 1920, c. 95, 41 Stat. 525) appears as an appendix to appellant's brief, page 73. Its pertinent provisions are:

> *Be it enacted* * * * That *no vessel owned by* the United States * * * shall hereafter, in view of the provision herein made for a libel *in personam, be subject to arrest or seizure by judicial process* in the United States or its possessions. * * *
>
> SEC. 2. That in cases where *if such vessel were privately owned* or operated * * * *a proceeding in admiralty could be maintained at the time of the commencement of the action* herein provided for, a libel *in personam* may be brought against the United States * * * *provided that such vessel is employed as a merchant vessel* * * *. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, *or in which the* vessel or cargo charged with liability is found. (Italics ours.)
>
> SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. * * * If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever

it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and cancelled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

Section 9 of the original Shipping Act of 1916, approved September 7, 1916 (c. 451, 39 Stat. 728, 730), provided:

Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and

> license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (Italics ours.)

The Act of March 3, 1899 (30 Stat. 1152), which requires owners of wrecks to mark and buoy the same, unless abandoned to the Government, appears in full as an appendix (p. 76) to the Appellant's Brief.

ARGUMENT

APPLICATION OF SUITS IN ADMIRALTY ACT

We construe the Act in any view to require the vessel concerning which liability is asserted to have the status of a merchant vessel at the time the loss occurs. It must be conceded the *Snug Harbor* did not have such status at the time the *Winstead* struck her wreck. If the Act be read to require the vessel to have the status of a merchant vessel at the time the libel is filed, this action can not be maintained, as the *Snug Harbor* had become a total loss nine months previously. The District Court concluded it did not have jurisdiction of the United States under authority of the Suits in Admiralty Act because the *Snug Harbor* did not have the status of a merchant vessel at the time the loss in suit happened. The appellant urges this as error and asks that the Act be applied so as to per-

mit any action in admiralty against the Government to be filed whenever like relief upon the same cause of action could be had between private parties. We admit that, as between private parties, relief is properly had by libel *in personam* for failure to mark and buoy a wreck in navigable inland waters.

Four constructions of the Suits in Admiralty Act may be stated:

1. The Act substitutes a remedy *in personam* for the enforcement of the same liability which in the case of privately-owned vessels would be enforced by a proceeding *in rem*.

2. The Act provides a remedy both upon principles of *in personam* liability and of *in rem* liability where the vessel involved at the time the cause of action arose was employed as a merchant vessel. If based upon principles of *in personam* liability, it must be limited to liabilities growing out of the possession, ownership, or operation of the vessel in merchant service; if based upon *in rem* liability, the offending vessel must have the status of a merchant vessel.

3. The Act imposes the same measure of relief as is had against private parties.

4. The right to any relief under the Act is conditioned upon the vessel concerned having the status of a merchant vessel at the time the libel is filed and such vessel then being within the United States or its possessions.

FIRST CONSTRUCTION

Section 9 of the original Shipping Act of 1916, approved September 7, 1916 (c. 451, 39 Stat. 728, 730), provided:

> Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels *shall be subject to* all laws, regulations, and *liabilities* governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. (Italics ours.)

This Court in *The Lake Monroe* (250 U. S. 246), construed this section as subjecting merchant vessels purchased, chartered, or leased by the Government in merchant service to arrest or seizure for the enforcement of maritime liens. To avoid the arrest and detention of Government merchant vessels and the filing of stipulations for their release when attached, the Suits in Admiralty Act was proposed. Section 1 of the original draft as it stood when under discussion before the Senate Committee provided:

> That the United States and any corporation in which the United States owns not less than a majority of the capital stock, may be sued *in personam* in the district courts of the United States, in admiralty, for any cause of action of which said courts

> ordinarily have cognizance in their admiralty and maritime jurisdictions, arising, since April 6, 1917, out of, or in connection with, the possession, operation, or ownership by the United States, or such corporation, of any merchant vessel, or the possession, carriage, or ownership by the United States, or such corporation, of any cargo, in those cases where, if the United States were suable as a private party, a suit *in personam* could be maintained, or where, if the vessel or cargo were privately owned and possessed, a libel *in rem* could be maintained and the vessel or cargo could be arrested or attached at the time of the commencement of the suit. Any such suit shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found, or in the district in or nearest which the cause of action arises. (See Hearing before the Committee on Commerce, United States Senate, Sixty-sixth Congress, first session on S. 2253.)

But this broad language was rejected and in its place was substituted the restricted wording of Sections 1 and 2 of the present Act.

The Committee on the Judiciary of the House in reporting the Bill with certain amendments said:

> The object of this bill is not to add to the liability of the Government, but to prevent

the seizure and detention of our ships, so as to eliminate this unnecessary loss. (See Report No. 497, House of Representatives, Sixty-sixth Congress, 2d Session.)

The legislative history of the Act appears by footnote.[1]

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[1] *History of Act.*—The original bill, known as S. 2253, was introduced in the Senate on June 26, 1919, and referred to the Committee on Commerce (66th Congress, 1st sess., Cong. Rec. vol. 58, pt. 2, p. 1784). On July 9, 1919, the same bill was introduced in the House as H. R. 7124 and referred to the Committee on the Judiciary (Cong. Rec. vol. 58, pt. 3, p. 2334). On August 28, 1919, the Committee on Commerce of the Senate held hearings on S. 2253. See report of hearing before the Committee on Commerce, United States Senate, S. 2253, upon which the committee submitted its report (No. 223, 66th Congress, 1st sess.), by which it reported back a new bill, No. 3076 (Cong. Rec. s. v., pt. 6, p. 6017). This bill was debated in the Senate (Cong. Rec. s. v., pt. 7, pp. 7317, 7439, 7440) and passed the Senate and was referred to the House and by it referred to the Committee on the Judiciary (Cong. Rec. s. v., pt. 8, p. 7538). The Committee on the Judiciary of the House held hearings on H. R. 7124, serial No. 4, and also on a substitute bill known as the Attorney General's substitute, which hearings are fully reported by serial 8, dated November 13, 1919, of the House Committee on the Judiciary.

On December 12, 1919, the Committee on the Judiciary submitted to the House its report (House Report No. 497), reporting the bill in a different form (Cong. Rec. 66th Congress, 2nd Sess., vol. 59, pt. 1, p. 498). This report was debated (Cong. Rec. s. v., pt. 2, pp. 1678–1693, 1750–1759). The bill went to conference and the conference report, amending the bill as passed by the House, was reported (Senate Document No. 233) to the Senate (Cong. Rec. s. v., pt. 4, p. 3350), and agreed to by the Senate (Cong. Rec. s. v., pt. 4, pp. 3690, 3691). It was also submitted in the House as House Report 669 (Cong. Rec. s. v., pt. 4, p. 3629), agreed

The Act and its history evidences no intention to make the United States liable for torts generally or to subject it to the same duties and obligations as rest upon private owners of vessels. The general purposes of the Act have been stated by this Court. In *Blamberg Bros.* v. *United States* (260 U. S. 452, 458), it said:

> This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe,* 250 U. S. 246. It was intended to substitute this proceeding *in personam,* as the first section of the act expressly indicates, in lieu of the previous unlimited right of claimants to libel such vessels *in rem* in the ports of the United States and its possessions.

Again, in *James Shewan & Sons, Inc.,* v. *United States,* 266 U. S. 108, 111, 112, this Court said:

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to by the House (Cong. Rec. s. v., pt. 4, p. 3631), examined and signed (Cong. Rec. s. v., pt. 4, pp. 3864, 3883), approved by the President March 9, 1920 (Cong. Rec. s. v., pt. 4, p. 4068), and became Public Act No. 156 (41 Stat. 525).

The hearings before the Committee on Commerce in the Senate were printed as of Thursday, August 28, 1919, while the hearings before the Committee on the Judiciary of the House were printed, the first hearing being Serial 4, dated August 28, 1919, and the second hearing being known as Serial 8, dated November 13, 1919.

> This act was enacted chiefly for the purpose of relieving the United States from obstruction to its commercial traffic by the seizure of merchant vessels owned by it or under its control, and was intended to substitute an *equivalent* (italics ours) remedy against the United States *in personam* for the right *in rem* against the vessel, which the Act of September 7, 1916, sec. 9, c. 451, 39 Stat. 728, had permitted. * * *
>
> In view of the purpose of Congress, in the Act of 1920 merely to substitute for an action *in rem* an action *in personam,* the natural construction would be one which, *ceteris paribus,* would measure the extent of the right to sue the United States *in personam* by that which had been granted in the Act of 1916 to sue *in rem* its offending or responsible vessel. The date of natural importance in fixing the liability *in rem* would seem to be that of the event out of which the liability grew. The date of the suit would be important only in the application of a statute of limitation or a change in character of the vessel from that of a merchant vessel to public vessel, or possibly some kind of a change in ownership or the happening of some other circumstance after the event which would exempt the offending vessel if privately owned from seizure under the rules of admiralty law.

If the right to sue the United States *in personam* is to be measured by that which had been granted by Section 9 of the original Shipping Act of 1916

to sue the offending vessel *in rem*, then no suit will lie in this case. The *Snug Harbor* prior to the injury complained of had become a total loss. She had ceased to exist as a merchant vessel. She had lost the personality ascribed by immemorial usage to ships and lay a mass of unrelated materials on the bottom of the sea. Not for anything that this inert mass of steel had done was this suit brought but for failure of the United States as her owner to mark its position. The liability asserted by the libel is not a liability of a vessel or even of the wreck of a vessel but the personal liability of the United States for failure to perform an alleged statutory duty.

It is not questioned that under the Suits in Admiralty Act, where all the statutory requisites concur, a suit may be brought against the United States in lieu of a suit against a merchant vessel owned by the United States to enforce a liability of the vessel, whether that liability be based upon contract or upon tort. But if founded upon tort, it is the tort of a vessel employed as a merchant vessel and not the personal tort of the United States.

SECOND CONSTRUCTION

Certain lower courts have construed the Act as providing relief upon principles of *in personam* liability as well as upon principles of *in rem* liability. They reason that the language of Section 2—"a proceeding in admiralty could be maintained"—

should have full and liberal construction and so construed, permits libels both *in personam* and *in rem* to be filed. The cases are collected in the footnote.[1] *Agros Corp.* v. *United States*, 8 F. (2d) 84, and *The Isonomia* (C. C. A. 2nd Cir.), 285 Fed. 516, are considered well-reasoned decisions. The view is that Section 1 prohibits "arrest or seizure by judicial process" of any Government vessel. Section 2 provides for a proceeding in admiralty in cases "where if such vessels were privately owned or operated * * * a proceeding in admiralty could be maintained." Arrest ordinarily is a taking under admiralty process *in rem*—the writ is called

[1] *The Isonomia*, C. C. A. 2nd, 285 Fed. 516; *Bashinsky Cotton Co., Inc.*, v. *United States* (D. C. S. D. N. Y., Mack, C. J.), 8 F. (2d) 79; *Atlantic Fruit Co.* v. *United States* (D. C. S. D. N. Y., Winslow, D. J.), 8 F. (2d) 81; *Agros Corporation* v. *United States* (D. C. S. D. N. Y., Learned Hand, D. J., now C. J.), 8 F. (2d) 84; *Cross* v. *United States* (D. C. S. D. N. Y., Goddard, D. J.), 8 F. (2d) 86; *The Elmac* (D. C. S. D. N. Y., Augustus N. Hand, D. J.), 285 Fed. 665; *Tug Nonpareil* (D. C. S. D. N. Y., Ward, C. J.), 1924 A. M. C. 312; *Sutherland & Co., Inc.*, v. *United States* (*Eastern Mariner*) (D. C. S. D. N. Y., Ward, C. J.), 1924 A. M. C. 996; *Grays Harbor Stevedoring Co.* v. *United States* (D. C. W. D. Wash., Cushman, D. J.), 286 Fed. 444; *Western Lumber Mfg. Co.* v. *United States* (D. C. N. D. Calif., Kerrigan, D. J.), 9 F. (2d) 1004; *The Anna E. Morse* (D. C. S. D. Ala., Ervin, D. J.), 287 Fed. 364; *Markle* v. *United States* (D. C. S. D. Texas, Hutcheson, D. J.), 8 F. (2d) 87; *Middleton & Co.* v. *United States* (D. C. E. D. S. C., H. A. M. Smith, D. J.), 273 Fed. 199. Contra: *Banque-Russo Asiatique-London* v. *Fleet Corp.* (D. C. E. D. Pa., Thompson, D. J.), 266 Fed. 897; *W. R. Grace & Co.* v. *United States* (D. C. S. D. N. Y., Knox, D. J.), 8 F. (2d) 80; *Villigas* v. *United States* (D. C. E. D. N. Y., Garvin, D. J.), 8 F. (2d) 300.

a "warrant of arrest." Seizure by judicial process includes the taking by judicial process under attachments other than arrest by an admiralty warrant. The phrase "proceeding in admiralty," ordinarily comprehends proceedings *in personam* as well as those *in rem*. Section 6 accords to the Government "the benefits of all exemptions and of all limitations of liability accorded by law" to private owners. The liability against which these limitations and exemptions are preserved is personal to the owner. These decisions suggest that the opinions of this Court in *Blamberg* v. *United States*, 260 U. S. 452; *Shewan & Sons* v. *United States*, 266 U. S. 108; and *Nahmeh* v. *United States*, 267 U. S. 122, must be limited to the questions presented. Each of the suits are based on *in rem* liabilities. The question in the first was whether an *in rem* suit would lie under the Act when the vessel was not within the United States; in the second, when the vessel was not "actually engaged in mercantile trade" and in the third, when the vessel was not within the district in suit.

The proviso of Section 2 is "provided that such vessel is employed as a merchant vessel." This limitation, if the construction now suggested is sound, requires the cause of action, if based upon *in personam* rights, to be related to the ownership, possession, or operation of a merchant vessel. However, in this case at the time of the loss of the *Winstead*, the *Snug Harbor* had been sunk and totally lost and her identity as a vessel destroyed.

THIRD CONSTRUCTION

This is the construction of the Act which the appellant here urges. It is that the Act permits suit against the Government on the admiralty side of the court both upon *in personam* and *in rem* liabilities in the same full measure that such actions are maintainable as between private parties. We deny such construction of the Act can be had. Section 2 reads:

> That in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States * * * provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

The proviso—"provided that such vessel is employed as a merchant vessel"—in plain terms, if the proceedings can be asserted under the Act upon principles of *in personam* liability, requires that the cause of action be related to or grow out of the operation of Government vessels employed as merchant vessels. This is its plain meaning.

This construction of the Act is unsound, whether the Act be given a strict or liberal application. The cause of action must relate to or concern a vessel employed in merchant service. At the time the barge *Winstead* was lost, the *Snug Harbor* was not "employed as a merchant vessel."

FOURTH CONSTRUCTION

It has been suggested that the right to any relief under the Act is conditioned upon the vessel concerned having the status of a merchant vessel at the time the libel is filed and such vessel then being within the United States or its possessions. This libel was filed nine months after the *Snug Harbor* was lost. Upon such construction, relief under the Act has been denied:

W. R. Grace & Co. v. *United States.* 8 F. (2d) 80.

Villigas v. *United States,* 8 F. (2d) 300.

It is suggested, though we can not believe seriously, that this suit can be maintained because, at the time of its commencement, a suit *in rem* might have been maintained against the wreck of the *Snug Harbor.* It is to be observed it was not to enforce any liability of the wreck that the suit was brought. The gravamen of the complaint is the failure of the owner to mark the position of the wreck. No suit *in rem* against the wreck would have been possible. For such proceeding to be maintained, the court of admiralty must have the custody of the *res.* It must have under its control and subject to its disposition something of substance and value. In this case there was no *res.* The total loss of the *Snug Harbor* implies that efforts to salvage the vessel would have been futile, or at least would have cost more than the salved materials, if any, were worth.

No attachment could have been served on the wreck. To take it into custody would have been impossible. No court could possibly have acquired jurisdiction over it, and certainly no court would have thought of attempting to do so. In any view, the *Snug Harbor* then did not have the status of a merchant vessel.

CONCLUSION

In any application or interpretation to be given the Act, it is clear to us that the Act requires the loss in suit to have an immediate relation to the employment of the vessel involved in merchant service. This is so whether the Act is to be read as providing a remedy for the enforcement of *in rem* liabilities only or if the Act is to be read as providing remedies for the enforcement of *in personam* and *in rem* liabilities. The libel here does not concern a loss arising out of the operation of a vessel in merchant service. The decision of the District Court, therefore, is correct and its decree should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
IRA LLOYD LETTS,
Assistant Attorney General.
J. FRANK STALEY,
H. H. RUMBLE,
Proctors for the United States.

NOVEMBER, 1926.

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SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1926.

Eastern Transportation Company, a corporation, Libellant, *vs.* United States and Seaboard Transportation Company, a corporation, Respondents.	Appeal from the District Court of the United States for the Western District of Virginia in admiralty.

[January 3, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Eastern Transportation Company filed a libel in admiralty *in personam* against the United States in the District Court for the Eastern District of Virginia, under the Suits in Admiralty Act of 1920, and against the Seaboard Transportation Company, as joint defendants. It averred that the libellant, a corporation of the State of Maryland, was the owner of the barge Winstead and the bailee of the cargo of the barge; that the Seaboard Transportation Company owned the tug Covington and the barge Pottsville; that on August 15, 1920, the steamship Snug Harbor, owned and used by the United States solely as a merchant vessel, while on a voyage from Baltimore, Maryland, to Portland, Maine, came into collision with the barge Pottsville in tow of the tug Covington, was sunk and became a total loss; that the wreck of the Snug Harbor lodged about 4¼ miles from Montauk Point in a frequented channel way within the harbors and inland waters of the United States; that it was not marked with a buoy or beacon by day or a lighted lantern by night; and was not removed by the United States or the Seaboard Transportation Company, and that no notice had been given or published advising mariners navigating the neighboring waters of the presence of the wreck; that the barge Winstead loaded with a full cargo of coal, on the 14th day of September, 1920, came into contact with the wreck and as a result was sunk, and it and its cargo became a total loss to the dam-

age of the libellant in the sum of $105,000; that the collision between the Snug Harbor and the Pottsville was due to the negligence of both; that the collision of the Winstead with the wreck was without negligence of those engaged in her navigation, but was due to the unlawful presence of the wreck for which the respondents were jointly and severally responsible.

The United States District Attorney appeared specially for the Government for the purpose of suggesting to the Court that it was without jurisdiction so far as the United States was concerned; that the cause of action stated related to a failure on the part of the officers and agents of the United States to perform a purely governmental function, or to the alleged negligence of such officers and agents in the performance of such a function, and created no liability on the part of the United States for which it was suable; that the cause of action in no way concerned a vessel employed as a merchant vessel; that the Suits in Admiralty Act was to prevent the arrest and detention of vessels owned or possessed by the United States then employed as merchant vessels, and it was only to prevent such arrest and detention and consequent interference with the operation of such vessels that the United States consented by the Act to be sued in respect to such vessels, and that the United States had never consented by the Act or otherwise to be sued in respect to a wreck or any object incapable of being employed as a merchant vessel; that the suit *in personam* provided for by the Act was intended by Congress to be only a substitute for a suit *in rem* against such vessel itself, and by the terms of the Act could be brought and maintained only in cases where if such vessel were privately owned a suit *in rem* could be maintained against her at the time of the commencement of such action and not then unless such vessel was employed as a merchant vessel at that time; that section 15 of the Act of March 3, 1899, making it the duty of the owner of any vessel or craft wrecked and sunk in a navigable channel immediately to mark it with a buoy or beacon by day and a lighted lantern at night, had no application to the United States of America, imposed no duty upon it and created no liability for which it was suable in the District Court below or elsewhere.

This issue on jurisdiction was presented by a motion to dismiss, which was denied by the District Judge, on the ground that

the question should be determined after the facts were elicited in the trial of the case. Subsequently the Judge reheard the suggestion of want of jurisdiction and reached the conclusion on the facts alleged that the court was without jurisdiction and dismissed the libel.

The record shows that by consent of the other parties the Seaboard Transportation Company has been dismissed for reasons appearing to the court and to counsel. It further appears that all questions of mere venue are waived.

This appeal, upon a certificate of the District Judge that the dismissal had been solely for lack of jurisdiction, was brought directly to this Court on March 20, 1925, under section 238 of the Judicial Code, as it was before it was amended by the Act of February 13, 1925, in accordance with section 14 of that Act, c. 229, 43 Stat. 936.

The case before us turns on the proper construction of the Suits in Admiralty Act. It was passed March 9, 1920, ch. 95, 41 Stat. at Large 525. Its first section provides that no vessel owned by the United States or by any corporation in which the United States or its representatives owns the entire outstanding capital stock shall thereafter "in view of the provision herein made for libel *in personam* be subject to arrest or seizure by judicial process in the United States or its possessions."

By section 2 in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action, a libel *in personam* may be brought against the United States if the vessel is employed as a merchant vessel. The suit is to be in a District Court of the United States for the district in which the parties suing reside, or at their principal place of business or in which the vessel or cargo charged with liability is found. The libellant is forthwith to serve a copy of his libel on the United States Attorney for such district and mail a copy thereof to the Attorney General and make a sworn return of such service and mailing to constitute valid service on the United States and the corporation.

The third section provides that the suits shall proceed and be heard according to principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit,

and when the decree is for a money judgment, it shall include interest at the rate of 4 per cent. per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest is to run as ordered by the Court. The decrees are subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. Then follows this language:

"If the libellant so elects in his libel the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned and possessed, a libel *in rem* might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief *in personam* in the same suit."

The United States is exempted from giving any bond, but it assumes liability to satisfy any decree in a cause in which a vessel of the United States has been arrested or in which a vessel previously possessed, owned or operated by the United States has been arrested in which the United States is interested and of which it desires release as suggested by the Attorney General.

Section 6 directs that the United States shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels.

Section 7 provides that if any vessel or cargo of the United States is seized by process of a court of any country other than the United States, the Secretary of State of the United States in his discretion upon the request of the Attorney General direct the proper United States consul to claim immunity from such suit and seizure and to execute a bond on behalf of the United States as the court may require for the release of the vessel or cargo.

Section 8 appropriates the sums needed to meet the final judgments against the United States authorized by the sections of the Act.

In view of the fact that the wreck which did the damage was a total loss, we assume that there is no *res* upon which a recovery *in rem* could be based, and therefore that a suit as between private persons, if maintainable, must rest on the personal liability of the owner of the wreck and must be in principle *in personam* as distinguished from an action *in rem* against the vessel wrecked. Hence it is that the libellant must establish that

under the Suits in Admiralty Act it was intended to give an action against the United States both in cases where the owner of the vessel would be personally liable, and in those where only the vessel would be liable.

The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires. It was this view which led us in *Blambarg Bros.* v. *United States*, 260 U. S. 452, to hold that as the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted, the Act did not apply in cases in which the seizure of a merchant vessel of the United States could not be prevented by the Act in a foreign port and court where the immunity declared by Congress could not be given effect.

In the case at bar the liability charged in this libel arose from occurrences under the Act of March 3, 1899, c. 425, 30 Stat. 1121, 1152, section 15. The Act is one making appropriations for the construction, repair and preservation of certain public works and rivers and harbors and contains regulations for the establishment of harbor lines and for the removal of obstructions in navigable waters of the United States.

Its section 15 provides, among other things, that whenever a vessel, raft or other craft is wrecked and sunk in a navigable channel, it shall be the duty of the owner of such sunken craft immediately to mark it with a buoy or beacon during the day and a lighted lantern at night and to maintain such marks until the sunken craft is removed or abandoned, that the neglect or failure of the said owner so to do shall be unlawful, that it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same and prosecute such removal diligently, and failure to do so shall be construed as an abandonment of such craft and subject the same to removal by the United States as thereinafter provided.

Section 16 provides for penalties of fine or imprisonment for the violation of section 15 as for a misdemeanor, or by both, and provides that the wrecked vessel may be proceeded against sum-

marily by way of libel in any district court in the United States having jurisdiction.

Section 19 provides for a period of 30 days before abandonment is complete unless legally established in less time. Under the averments of the libel there is no presumption of abandonment, certainly not within the 30 days, merely to relieve the owner of the wreck of his affirmative duty during that time to protect commerce against its danger. *People's Coal Co.* v. *Second Pool Coal Co.*, 181 Fed. 609, affirmed 188 Fed. 892. We do not think that abandonment is a factor in this case.

It is first objected to the recovery here that it was not intended by the Suits in Admiralty Act to subject the United States itself to prosecution for a crime which it denounces in its legislation. We need not be troubled by this objection, because there is no attempt here to prosecute the United States or any of its agents criminally. The declaration that the leaving of a wreck in a navigable channel in a place dangerous to passing steamers without notice of the danger and without immediate removal is unlawful, makes such omission a maritime tort which, if merchant vessels of the United States are to respond in tort, may be recovered for in its admiralty courts against the United States without anomaly. *The Fahy*, 153 Fed. 866; *The Macey*, 170 Fed. 930; *People's Coal Company*, 181 Fed. 609, 188 Fed. 893. Under the Tucker Act and the general jurisdiction of the Court of Claims, of course, the United States is made liable only upon a contract express or implied, and not for a tort, but its liability provided for in the Suits in Admiralty Act can not be limited to contracts any more than the liability of its merchant vessels under the Shipping Act of 1916 could be so limited. *The Lake Monroe*, 250 U. S. 246.

By the Shipping Act of 1916, approved December 7, 1916, c. 451, 39 Stat. 729, the United States Shipping Board was established for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States, and authority was given to that Board to purchase, lease or charter vessels suitable as far as the commercial requirements of trade of the United States might permit. By section 9, any such vessel while employed solely as a merchant vessel was made subject to all laws, regulations and liabilities governing merchant vessels, when the United States was interested therein as owner in whole or in part, or other-

wise. It was under this provision that vessels belonging to the United States engaged as merchant vessels were arrested and held in an action *in rem*. In *The Lake Monroe*, 250 U. S. 246, we decided that such a merchant vessel was subject to judicial process in admiralty for the consequences of a collision. It would seem clearly to follow that, under the Act of 1916, if a wreck of a merchant vessel of the United States in a navigable channel, not properly protected, caused damage to a vessel navigating the channel, the owner of the latter would have a remedy *in rem* against the wreck. Had the Suits in Admiralty Act not been passed and had the wreck become a total loss, there is nothing in the previous legislation, in the Act of 1916, or elsewhere, by which the Government could be made generally liable like a private owner for damages for failure to protect vessels against the wreck under the Act of 1899.

Did the Suits in Admiralty Act intend to extend and expand the *in rem* liability so as to make the United States so generally liable?

As we have already intimated, the main purpose of the Act of relieving United States merchant vessels from seizure and arrest would lead us to limit the operation of the Act to such a remedy as would be commensurate only with the immunity from seizure extended by the Act to United States merchant vessels and to a proceeding which while in form *in personam* would be attended only with the incidents of a proceeding *in rem* as if against a vessel libelled, arrested and released under a stipulation or bond by the United States to pay all damages. In spite of the purpose of the Act to create a substitute for a suit *in rem*, however, we are forced to the view by the language used in sections 3 and 6 that it must be construed to have a wider effect than that which its section 1 would lead us to expect. The second section declares that in cases of immunity from arrest provided for in the first section, where if the vessel or cargo had been privately owned or possessed, a proceeding in admiralty could be maintained at the commencement of the action, a libel *in personam* may be brought against the United States. The expression "a proceeding in admiralty" is broad enough to cover both a libel *in personam* and a libel *in rem*, but if that were all we could properly limit its scope, purpose and incidents to that of a suit *in rem* merely transmuted into the form of an action *in personam*. The third section, however,

provides that if the libellant so elects in his libel, the suit may proceed in accordance with the principles of libels *in rem* wherever it shall appear that had the vessel or cargo been privately owned or possessed, a libel *in rem* might have been maintained, but it then proceeds to say "But election so to proceed shall not preclude the libellant in any proper case from seeking relief in personam in the same suit." It is impossible to reconcile this language with the idea that the action provided for is one which in form only is *in personam* against the United States, but which in fact is one having the limitations, operation and result of a suit *in rem*. The words certainly assume that there may be proper cases under the Act in which there is to be a remedy really *in personam* against the United States and also one in substance *in rem* against its vessels for which its own personal liability is substituted. We have heard no suggestion or hypothesis which satisfies the provision for this double remedy thus expressly given, which would not include the general *in personam* liability of the United States as the owner of an offending vessel like that of a private owner.

This view is further borne out by the sixth section which provides that the United States shall be entitled to the benefit of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels. The necessary implication is that if under the Harter Act (c. 105, 27 Stat. 445) or the Limitation of Liability Act, sections 4282-4287, R. S., the United States as owner of a merchant vessel should not be able to show performance of the conditions upon which such statutory limitations of liability are granted, it must assume the personal liability for negligence in such cases exactly as a private owner would.

This construction of sections 2, 3 and 6 is sustained by the weight of authority in the lower courts. *Agros Corporation* v. *United States*, 8 Fed. 2nd series, 84; *The Anna E. Morse*, 287 Fed. 364; *Bashinsky Cotton Co.* v. *United States*, 8 Fed. 2nd series, 79; *Markel* v. *United States*, 8 Fed. 2nd series, 87; *Cross* v. *United States*, 8 Fed. 2nd series, 86; Benedict on Admiralty, 5th ed. vol. 1, section 194.

Do *Blamberg* v. *United States*, 260 U. S. 450; *Shewan & Sons* v. *United States*, 266 U. S. 108; and *Nahmeh* v. *United States*, 267 U. S. 122 militate against this view? In those cases the Court emphasized the main purpose in the Act to be to rid the United States

of the inconvenience to which it and its subordinate Shipping Corporations were subjected by having their vessels in the merchant trade arrested and seized under the Shipping Act of 1916 by substituting therefor a suit *in personam* against the United States with consequent appropriations to meet the liability thus imposed. We did not then have before us the question whether the statute substituted a remedy limited to what an action *in rem* would be with a statutory stipulation and bond of the United States to take the place of the vessel, or whether it created a broader personal obligation of the United States, both personal and *in rem*, like that of the private owner of a vessel. The question in the *Blamberg* case was whether the Act applied at all in cases in which there could be no immunity granted by Congress to vessels of the United States. The *Shewan* case only involved the question whether that which had been a merchant vessel of the United States continued to be such and satisfied the Act, if it were laid up and had not been changed to be a public vessel of the United States. The *Nahmeh* case was one of venue as to the district courts in which suits could be brought under the Act, that is, whether only one of three courts described in the Act, or any one of the three could be used in each instance. Neither case involved the important question now before us, and while the emphasis placed in those cases upon the main purpose of the Act as that of the mere substitution of a remedy for a proceeding *in rem* against merchant vessels of the United States and its effect on its interpretation may have been too marked, there is nothing in their decision inconsistent with the conclusion which we have here reached.

It is finally insisted for the Government that recovery against the Government under the Suits in Admiralty Act, whether *in personam* and *in rem*, must be on a cause of action related to or growing out of the operation of Government vessels employed as merchant vessels, and that as the collision with the wreck was not with a vessel employed as a merchant vessel, the Act does not apply. We think this reasoning to be too fine. What the statute means by saying "employed as a merchant vessel", is that the vessel shall belong to that class as distinguished from one employed in the governmental service, not necessarily that it shall be actively thus employed at the time of the collision. *Shewan & Sons* v. *United States, supra.* The cause of action grows out of the responsibility

of the Government for a merchant vessel which in the course of its employment had become a danger to navigation and which imposed a duty to avoid that danger. A wreck which is a total loss will not furnish basis for an action *in rem*, as we have assumed, but if a proceeding in admiralty permitted by the Act embraces the principles both of suits *in personam* and suits *in rem*, it is a most natural construction of the Act dealing with merchant vessels employed by the United States, to include as a suit *in personam* it permits, one for a tort caused by the negligence of the United States in dealing with a wreck of its merchant vessel and its failure to comply with its own navigation laws therewith.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

A true copy.

Test:

Clerk, Supreme Court. U. S.